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THE REMOVAL OF JUDGE LORING.[1]

We call the attention of our readers to the document the title of which is given below, with regret. We propose to examine it and to discuss its positions very much in the order in which they are presented, if, indeed, it can be said to have any order or method. It is evidently drawn up by a person, who, however well educated, has had little experience in presenting a subject, and especially a legal subject, argumentatively. Considering, too, the question which the committee had before them, so momentous, not in the immediate issue, but in the principles and consequences involved, and the precedent it would establish, we have regretted to see that, instead of being a dispassionate argument, commencing with laying down its reasons and going on with calm judicial dignity to its conclusions, it manifests in its very commenceent, after a few extracts from Blackstone and the Declaration of Rights, having very little bearing on the case, the foregone conclusion of its supporters, and seems to be drawn up on the theory that the remonstrance of Judge Loring, once answered, the work of the committee was done, and the recommendation of removal followed as a matter of course.

The whole case against Mr. Loring may be stated in a few words. In June last, acting as commissioner of the Circuit Court of the United States, which office he had

[1] Report of the Committee on Federal Relations on divers petitions for and against the removal of Edward G. Loring, from his office of Judge of Probate for the County of Suffolk. Commonwealth of Massachusetts, House of Representatives, March 22, 1855. House Document, No. 93.

held for fourteen years, after a full hearing, he sent back to V rginia a fugitive slave, under the United States law of 1850. For this act, the petitioners now ask that he may be removed from the office of Judge of Probate for the County of Suffolk. It is not easy to gather from the report, hat any specific offence is charged against Judge Loring, except that he "has lost the public confidence." It is admitted that he has not been guilty of any crime, yet an attempt is made to charge him with a violation of the State law of 1843.

This law is as follows:

SECT. 1. No judge of any court of record of this Commonwealth, and no justice of the peace, shall hereafter take cognizance or grant a certificate in cases that may arise under the third section of an act of Congress, passed February twelfth, seventeen hundred and ninety-three, and entitled "an Act respecting fugitives from justice and persons escaping from the service of their masters," to any person who claims any other person as a fugitive slave within the jurisdiction of this Commonwealth.

SECT. 2. No sheriff, deputy sheriff, coroner, constable, jailer, or other officer of this Commonwealth, shall hereafter arrest or detain, or aid in the arrest or detention or imprisonment in any jail or other building belonging to this Commonwealth, or to any county, city or town thereof, of any person for the reason that he is claimed as a fugitive slave.

SECT. 3. Any justice of the peace, sheriff, deputy sheriff, coroner, constable, or jailer, who shall offend against the provisions of this law, by in any way acting directly or indirectly under the power conferred by the third section of the act of Congress aforementioned, shall forfeit a sum not exceeding one thousand dollars for every such offence, to the use of the county where said offence is committed, or shall be subject to imprisonment not exceeding one year in the county jail."

It was passed under the excitement caused by the use of the jail in the county of Suffolk as a place of detention for a fugitive slave a short time before, and any one reading it must, we think, necessarily come to the conclusion that its meaning was simply this: That the State of Massachusetts, exercising a right which is now undoubted and acknowledged, (*Prigg's Case*, 16 Pet. 539,) has withdrawn the aid of her magistracy, of her executive officers, and her jails, in carrying out the provision of the constitution and the laws made in pursuance of it, respecting fugitives owing service and labor. We do not know of any authority that we can cite, we hardly know of any argument that we can adduce, to illustrate this position. It appears to be one of those cases where simple statement is the best argument. But there are certain considerations collateral to the main question, not bearing directly on the construction of this

statute of 1843, but tending to show what might have been in the contemplation of the legislature, that it may be well to state.

Our system of government is composed of two parts; and each man owes allegiance to the nation and to his own State. On some subjects, the claim of the nation is dominant over that of the State. In others, that of the State is dominant over that of the nation. But both these powers, being parts of one harmonious system, agreed upon by the whole country for the good of the whole, it is absurd to suppose, that any man may not serve both the nation and the State at the same time, except in cases where there is a natural incompatibility in the services, and they conflict with each other, or else where the union of the two services is forbidden by some positive law, either of the nation or the State. Now there is not any pretence that there is any natural incompatibility between the offices of judge of probate and commissioner of the United States courts. We speak argumentatively, and assume, for the present purpose, that the duties of the latter office are proper to be exercised by some person or other.

Nor is there any thing in the laws of the central government or of the State, which forbids the meeting of these offices in the same person. This is not a mere oversight, as Judge Loring has himself shown in his remonstrance to the legislature. The restrictions on the judges of probate as to engaging in other pursuits are defined in the Rev. Stat. ch. 83, entitled "of the Probate Court." In this statute we do not find any thing forbidding a judge of probate from acting as an United States commissioner.

The legislature of the Commonwealth, acting under the constitution, has thus far guarded the office of judge of probate in particular, from collision with other pursuits which they held to be incompatible with its exercise.

But there is something more than this special provision of the legislature in the case of a judge of probate. The people have deliberated upon the subject of the "incompatibility of officers" generally, and have declared their will through the constitution. The eighth article of the amendments to the constitution is entitled "Incompatibility of Offices," and is as follows:—

"No judge of any court of this Commonwealth, (except the Court of Sessions,) and no person holding any office under the authority of the

United States, (postmasters excepted,) shall, at the same time, hold the office of governor, lieutenant governor, or counsellor, or have a seat in the Senate or House of Representatives of this Commonwealth; and no judge of any court in this Commonwealth, (except the Court of Sessions,) nor the attorney general, solicitor general, county attorney, clerk of any court, sheriff, treasurer and receiver general, register of probate nor register of deeds, shall continue to hold his said office after being elected a member of the Congress of the United States and accepting that trust; but the acceptance of such trust, by any of the officers aforesaid, shall be deemed and taken to be a resignation of his said office; and judges of the Court of Common Pleas shall hold no other office under the government of this Commonwealth, the office of justice of the peace and militia offices excepted."

It must appear from the structure of this article, that the whole subject was in the minds of the legislature and the people; that they had found the constitution defective, and thus applied the remedy. The article treats of the incompatibility of offices holden under the United States, with those holden under the State, a point omitted in the constitution; it excludes certain State officers from holding certain offices under the United States, and incapacitates certain United States officers from holding offices under the Commonwealth. Here, again, there is nothing to prevent the two offices now under consideration from meeting in the same person. And the argument for their union is much stronger than it would be if the statutes and the constitution were entirely silent on the subject. If it be urged that this silence was an oversight, and that here was a *casus omissus;* we answer, the wise and thoughtful men who have established our form of government, have evidently had the whole subject, if not in relation to this particular case, yet in a general view that would include this and all other cases, under their consideration, and the result has been as we have stated above. We have a right to say, then, that there is nothing in the letter or the spirit of the constitution or legislation of Massachusetts as they existed before the present question arose, which renders the two offices held and exercised by Judge Loring incompatible. The subject has been fully brought before the public, and has been left untouched. The rule *expressum facit cessare tacitum*, is most peculiarly applicable to a case like this.

And is it not the course most consistent with sound statesmanship that this should be so; that we should endeavor to complicate as little as possible the relations between the federal and State governments, that we should leave the career open to men judged to be able to serve their country in any way and in all ways in which their services may

be useful, and should endeavor to strengthen the bond that now holds this Union together, by showing practically that there is nothing antagonistic in the working of the two systems, and that they are capable of harmonious though entirely independent action?

Such have been the general principles, according to which the people of Massachusetts have dealt with this subject. But this is not all. To show that the present crusade against Judge Loring is the product of a mere afterthought, and not justly founded upon any real opinion that he has violated either the law or the settled convictions of Massachusetts, we proceed to show what the exposition of the subject has been practically and in theory by the people and the legislature since the fugitive slave law of 1850 was passed, and since it was very well known that that law must be enforced in Massachusetts.

The sentiments of the legislature have more than once been brought to a direct test or crucial experiment upon the subject of the fugitive slave law.

In the report before us it is pertinaciously urged that Judge Loring's action in the Burns' case, under the law of 1850, was virtually a violation of the State law of 1843. The law of 1843, as we have seen, applies only to the third section of the United States Act of 1793, and it has been thought to be so defective in its application to a law passed seven years after its own enactment, that Mr. Dana in his able and manly argument before the committee says: —

"The passage of this law, and of other similar laws, I believe, in other States, was one of the excuses for the passage of the law of 1850. The South said, if Massachusetts refuses us the use of her State machinery, we will provide that of the federal government. They did so. The act of 1850 was passed. When this law passed, all the U. S. commissioners in this State were also State magistrates, and one was a State judge. Mr. Sumner, who was a justice of the peace as well as a commissioner, offered to sit as commissioner in any case they would bring to him. I believe he gave written notice to that effect to Mr. Marshal Devens. Mr. Curtis did act, in two cases, but no lawyer, as I am aware, contended that he had violated the law of 1843. At the very first session of the legislature after the passage of the fugitive slave law, an attempt was made to extend the law of 1843 to the law of 1850. The first section of Mr. Buckingham's bill (Sen. Doc. 51) so provides. The bill was lost in the Senate, by a vote of 13 to 16. The entire bill for the 'further protection of personal liberty' was lost. The same year, in the House of Representatives, resolutions condemnatory of the fugitive slave law of 1850, (House Doc. 187,) very moderate in their character, were lost by a vote of 164 to 167. This was in the coalition legislature. The same year, during the session of the legislature, under its very eye, occurred the rendition of Sims. The court house was in chains. The judges went under them.

The sheriff refused to serve your precepts. Massachusetts law was suspended. Your courts were closed to all, except such as the United States marshal chose to admit. Massachusetts lay at the foot of the slave power. What did the legislature do? Nothing! Absolutely nothing! Your committee examined the parties and reported the facts. They complained that Mr. Hallett and Mr. Tukey insulted them, but said that the others were very polite. The report was allowed to go by, and Massachusetts did nothing. The popular elections, even, did not indicate that Massachusetts was in earnest in condemning the fugitive slave law.

In 1852, Mr. Sewall introduced his bill 'further to protect personal liberty.' (Sen. Doc. 76.) It passed the Senate by a vote of 18 to 16; but it was lost in the House, by a vote of 158 to 167, and its death-blow was given to it on the motion of Mr. Henry J. Gardner, of Boston. Now you propose to address the same Mr. Gardner, in his capacity as governor, and ask him to remove Judge Loring from office, because he has flown in the face of the legislation of Massachusetts! In the same year, resolutions, carefully drawn and moderate in their character, generally attributed to Mr. Hoar of Worcester, intended to commit Massachusetts against the fugitive slave law, were defeated by a vote of 178 to 162. In 1853, Massachusetts elected Mr. Everett to the Senate of the United States, a man thoroughly committed to the support of the fugitive slave law. And now, in 1855, this very committee is reporting a bill, the first section of which proposes to extend the act of 1843 to the law of 1850, to do what Massachusetts has refused to do up to this time."

This extract precludes the necessity of any further statement to the same effect, and shows clearly the point we have intended to establish: that the attention of the legislature has been distinctly and repeatedly called to the subject of preventing, as far as it could, the persons who held State commissions from acting under the United States statute of 1850; that the action on this subject has been taken almost wholly since the impression stamped upon the public mind by the result of the Sims' case, yet that every attempt to inhibit the commissioned servants of Massachusetts from acting also as United States commissioners has signally and completely failed. And now Judge Loring is arraigned for acting as such commissioner, the burden of the report before us being the impropriety of his acting under the United States law of 1850.

It is a further proof of the sudden character of the indignation that is expressed, that it is only in this case that the feeling has been manifested, though it is not the only or the first opportunity that has been afforded for its display. Until Judge Loring was made so prominent in connection with this matter, Mr. George T. Curtis has been the foremost object upon whom the opponents of the law, and of all connected with it, have vented their indignation. So far as it could be done by tongue or pen, he has been transfixed and pierced a thousand times, and we confess that

whatever obloquy may justly attach to a public officer for obedience to the law, Mr. Curtis has no right to exemption from a very large share of it. The more obnoxious he has been, or is, the more does the tyrannical inconsistency of the signers of the report before us show itself. In 1851, Mr. Curtis, acting as commissioner in the case of Sims, granted a certificate to the claimant, under which Sims was carried back. This was the first case from Massachusetts. When he, as United States commissioner, so surrendered Sims, in April, 1851, he held a commission as justice of the peace in Massachusetts. After the surrender of Sims, viz., July 15, 1851, a new commission was ordered to be issued to Mr. Curtis, without any application by him, as Justice of the Peace *and Quorum*, signed by Governor Boutwell, and countersigned by AMASA WALKER, Secretary of the Commonwealth, who now heads a petition for the removal of Judge Loring. The original commission did not reach Mr. Curtis, but it is recorded as having issued. On the 1st Dec. 1852, Amasa Walker, Secretary, &c., issued and certified a duplicate of this commission, bearing the same date as the original, which appeared of record, but which Mr. Curtis had not received, and under this duplicate Mr. Curtis qualified, and still holds the commission.

If the argument of the committee has any force, Gov. Boutwell and Secretary Walker, and the Executive Council, all violated what the committee call the *spirit* of the law of 1843; for they recommissioned, as a State magistrate, a person who had acted as a commissioner under the United States law of 1850, while he still held the latter office, and within three months after the extradition of Sims. Gov. Boutwell and Secretary Walker were placed in their respective offices by "The Coalition." The free-soil branch of that coalition had never set up the doctrine now contended for, that the law of 1843 is to be construed as a notice to State magistrates not to act as commissioners under the United States law of 1850. If they had held this doctrine *then*, they should have acted upon it, and should have prevented the issuing of a new and higher commission to a magistrate who had done exactly what Judge Loring has done. It may be said that Mr. Walker was only discharging an official duty; but if it was Judge Loring's duty to resign his commission rather than perform the obnoxious duties which were imposed upon him, so it was the duty of Mr. Secretary Walker to resign his office rather than countersign a commission which ought not to

have been issued, if the ground now taken by him is tenable.

It would be a waste of time to take up sentence by sentence a paper so very unskilfully drawn as the report before us. Were it worth the while, it would be an easy matter to dissect and examine its arguments and allegations and to show how fumbling, how discursive, how pointless, and how utterly inconsequential, are its attempts at reasoning. It is, in a word, as we have stated, an attempt to inculpate Judge Loring, on the ground of a moral violation of the State law of 1843. In the absence of any distinctly enunciated propositions to which we might reply, we have treated the matter generally, and have attempted to show that neither from the letter or spirit of the law, nor from the contemporaneous and subsequent exposition given to it, nor from the practical action of the executive, the legislature, or the people, could it be presumed that any objection would be taken to the discharge, by an individual holding an office under the State government, of the duties of another office in no wise incompatible with it, and as to which the laws of the State were silent. Having, as they assume, convicted Judge Loring of a moral fault, (they do not pretend that it amounts to an impeachable one,) the committee go on to vindicate the right of the removal by address. The committee are hard put to it, in recommending the exercise of this power in the case of Judge Loring.

> Non amo te, Sabidi, nec possum dicere quare,
> Hoc solum novi — non amo te, Sabidi.

They say, p. 8: —

> "The power of removal by address, under chapter III., article 1, of the constitution, was intended to reach cases in which judges might not be subject to impeachment.
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> The individual holding office may not be guilty of crime, gross immorality or official misbehavior, so as to be liable to removal for such cause on trial, and to judgment on impeachment, and yet, from gross or rash measures, or loathsomeness of person, or general offensiveness to the community, or from loss of the public confidence, ought to be removed by address which is without trial or judgment."

"The loss of public confidence" is the only specification in the above assignment which can possibly be applied to Judge Loring, and this is so vague in itself, so manifestly the product of the mere party excitement, — to feed which this whole question has been agitated,—and is so utterly untrue in fact, that we may safely say that it is merely used as a veil to cover the moral nakedness which would be disclosed

by an avowal of the real motive, which we believe to be no other than an attempt to exercise a power reserved by the constitution, in an arbitrary and tyrannical manner for the purpose of gratifying the *odium politicum* of a party, at the expense of a most unoffending and upright magistrate.

The claim to this arbitrary exercise of power is not directly announced, but it is evident that the committee feel that the motive is too palpable for concealment; and therefore, though they do not directly claim, they do directly argue in favor of, such an exercise of it. The considerations which are so urged, are based mainly upon the authority of speeches in the State Constitutional Convention of 1850. Sentences are extracted from the speeches of several eminent members of that convention for the manifest and only purpose of claiming the weight of their opinion and authority in favor of the irresponsible, capricious exercise of the removing power.

For this purpose, the speeches are garbled, sentences are torn from their context and used as evidence that the opinions of the speakers were directly the contrary of what, by reading the debates in full, it will be seen their real sentiments were — and passages which in fact were intended to make as odious as possible the undue exercise of this power, are brought forward in this report as expressing their advocacy of it. It behoves us to speak with respect of a legislative committee, but we cannot but say, that were the distortion of evidence of which this report is guilty in this particular, practised by common men in a mercantile transaction, it would brand them with a name which we forbear to apply to men from whom Massachusetts is receiving her laws.

This is a matter of so much importance, as showing how deserving of the "public confidence" are those men who advocate the removal of Judge Loring on account of his "loss of the public confidence," that we deem it necessary to examine the subject at some length.

Previous to the convention of 1820, for amending the constitution, as well as since, the power of removal from judicial office could be exercised on address by a mere majority of the two houses. It was proposed in the convention to alter this so as to make a majority of two-thirds necessary for such removal, and upon this question the debate arose. The committee say, p. 10: —

"The reasons for giving this power were clearly set forth in the debates

upon this subject in the Constitutional Convention of 1820, as the following extracts will show: —

Mr. Shaw (now Chief Justice Shaw) said: 'What is meant by good behavior? The faithful discharge of the duties of the office. If not faithful, they were liable to trial by impeachments; but cases might arise when it might be desirable to remove a judge from office for other causes. He may become incapable of performing the duties of the office without fault. He may lose his reason, or be otherwise incapacitated." —*Journal of Debates in Convention*, 1820, p. 476.

Now, to quote this passage in this connection, can mean nothing else than to bring forward the great authority of Chief Justice Shaw in favor of the power of removal on address by a bare majority. But, on reference to the debates, we find that he was in favor of increasing the majority to two-thirds; and that the above extract is part of a speech showing how liable this power of removal on address is to be abused, and that, therefore, it should be more restricted. Immediately following the passage cited in the report Mr. Shaw goes on to say: —

"It is the theory of our government that no man shall receive the emoluments of office, without performing the services, though he is incapacitated by the providence of God. It is necessary, therefore, that there should be provision for this case. But in cases when it applies, the reason will be so manifest as to command a general assent. It must be known so as to admit no doubt, if a judge has lost his reason, or become incapable of performing his duties. As it does not imply misbehavior, if the reason cannot be made manifest so as to command the assent of a great majority of the legislature, of two-thirds at least, there can be no necessity for the removal. By the constitution as it stands, the judges hold their offices at the will of the majority of the legislature. He confessed with pride and pleasure that the power had not been abused. But it was capable of being abused. If so, it ought to be guarded against. That could be done by requiring the voice of two-thirds of each branch of the legislature. If unfortunately it should happen that this power should be resorted to for purposes which the constitution did not intend — to gratify the wishes of a party, it would put at risk the security of life, liberty and property, intended to be guarded by the independence of the judiciary. Suppose a party, from a temporary triumph, should remove judges when the justice of it is not manifest, and the party which makes the removal should be put down. Their successors in power would say it was an act of justice to restore those who were put out of office. In such case the whole judiciary system would necessarily, after one or two changes, be put entirely at the will of the prevailing party. He hoped the convention would adopt the remedy which was proposed, and which would leave the power of removal to be exercised in cases where it ought to be, and in no other."[1]

The latter half of this passage seems to describe with prophetic wisdom the circumstances in which we are now placed.

[1] The passages we cite from the debates in the Convention of 1820, are taken from the volume entitled "Journal of Debates and Proceedings in the Convention of Delegates, chosen to revise the Constitution of Massachusetts."

Again the report says, p. 12: —

"Mr. Davis, of Boston, (since solicitor-general,) said: 'No reason need now be given for the removal of a judge but that the legislature do not like him.'"

The whole of Mr. Davis's speech is as follows: —

"Mr. D. Davis of Boston thought it absolutely necessary that there should be some modification of the power of removal granted by the constitution. It was the only instance of any government of law or liberty where a man was liable to be tried, condemned and punished unheard and unseen. The constitution contemplates removal of judges from office for two causes only. For crime, by impeachment on the grand inquest by the representatives — and for being disqualified to perform the duties of the office by the visitation of God. He had known of but one instance of the removal of a judge for this last reason, and he believed it was the general opinion that in that instance, the legislature would have done better, if they had waited on Providence a little longer. The power of removal by address, which was intended to apply only to cases of disqualification by the visitation of God, in fact extended much farther, and was liable to be abused. It was a defect which ought to be remedied. We had the example of the regenerated and republican State of Connecticut. They had had the experience of a dependent judiciary — and in recently establishing their constitution they had adopted the same limitation of the power of removal which was proposed here. If the resolution were before the committee in a form which admitted of amendment, he would propose to alter it in such manner that the officer to be removed should have a right to be heard. *No reason need now be given for the removal of a judge, but that the legislature do not like him.* It was no light thing that an office holden on the tenure of good behavior, may be taken away with the loss of character which it naturally involves, and the person removed not even know the reason of it." — *Journal*, &c., p. 478.

Can any thing be imagined more uncandid than to garble such a speech by quoting such a passage as that cited in the report as showing the opinion of Mr. Davis?

The report, p. 12, quotes from Mr. Webster's speech as follows: —

"It is not made necessary that the two houses should give any reasons for their address, or that the judge should have an opportunity to be heard."

We cannot afford room to copy the whole of this speech, but the sentence above cited is in connection with the following: —

"I look upon this as against common right, as well as repugnant to the general principles of the government. The commission of the judge purports to be, on the face of it, during good behavior. He has an interest in his office. To give an authority to the legislature to deprive him of this, without trial or accusation, is manifestly to place the judges at the pleasure of the legislature. The question is not what the legislature probably will do, but what they may do. If the judges, in fact, hold their offices only so long as the legislature see fit, then it is vain and illusory to say that the judges are independent men, incapable of being influenced by hope or by fear; but the tenure of their office is not independent. The general theory and principle of the government is broken in upon, by giving the legislature this power." — *Journal*, &c., p. 482.

Is any comment necessary to show, is any language strong enough to stigmatize such citation as this?

We call the attention of our readers to the whole of Mr. Webster's speech. It is a most earnest argument on the dangerous tendency of the power of removal on address.

The report proceeds, p. 12:—

"Mr. Story, (since Judge of the United States Supreme Court,) endeavoring to show how far the power of address extends, said: 'The governor and council might remove them on the address of a majority of the legislature; not for crimes and misdemeanors, for that was provided for in another manner; but for no cause whatever — no reason was to be given.'"

Without comment upon the mistake of mere pardonable ignorance manifested in saying, "Mr. Story, (*since* Judge of the United States Supreme Court,") we will cite a longer passage from Judge Story's speech, beginning with that garbled into the report. We wish we had room for the whole.

"It was said that the judges should hold their offices during good behavior — the terms were so in the constitution — but while another clause of the constitution remained, the fact was not so. The governor and council might remove them on the address of a majority of the legislature, not for crimes and misdemeanors, for that was provided for in another manner, but for no cause whatever — no reason was to be given. A powerful individual, who has a cause in court which he is unwilling to trust to an upright judge, may, if he has influence enough to excite a momentary prejudice, and command a majority of the legislature, obtain his removal. He does not hold the office by the tenure of good behavior, but at the will of a majority of the legislature, and they are not bound to assign any reason for the exercise of their power. *Sic volo, sic jubeo, stet pro ratione voluntas.* This is the provision of the constitution, and it is only guarded by the good sense of the people. He had no fear of the voice of the people when he could get their deliberate voice — but he did fear from the legislature, if the judge has no right to be heard. It was said we had had good judges under this provision, and that they had not been removed. He admitted it — he apprehended no evil for the present — but begged gentlemen not to deceive themselves — the first instance of removal would establish a practice which would never be departed from, of shifting the whole court with every change of the party in power. Why had this evil never yet been felt? He did not wish to allude to parties that had existed, but he must allude to facts. For forty years past it had so happened that the judges had, except for a few years, always agreed with the party in power. It was not when they were of the same opinions of the majority of the legislature that there was any danger, but when they were with the minority. It is always the great object of the majority to weaken the minority, and this provision puts it in the power of the majority to remove every judge opposed to them. It is the minority who are interested in the independence of the judges. Is there no danger that if they are made dependent on the will of the majority, they will be complaisant to that majority at the expense of the minority? that the right of the poor man will be in danger, when opposed to the interests of the powerful man in the majority? He referred to the example of a neighbor-

ing state, in which three whole benches of judges had been removed in the space of three or four years; and to the experience of certain other States, (not within this circuit,) where, from the dependence of the judges, justice is not impartially administered, and, in consequence, instances have frequently happened of citizens being obliged to escape to a neighboring State, to give them a right to the courts of the United States." — *Journal*, &c., p. 521.

Again we cite from the report, p. 13: —

"Mr. Prescott, a name well known and honored among the judiciary, though opposed to the unlimited retention of the power, yet acknowledged its existence, saying 'There may be other cases in which they ought to be removed, when not guilty of misconduct in office, but for infirmity.' 'The two other departments may remove them without inquiry — without putting any reason on record. It was a power to say that judges shall no longer hold the office, and that others more agreeable shall be put in their places.'"

We proceed to copy from the debates the passage immediately following this last sentence: —

"He asked, was this independence? If it was not, the constitution did not secure it. It was not for the present time that it was necessary. Perhaps the experience of the past had not shown the want of it. It was enough to show that the security of every person who has rights may at some future day be dependent on it." — *Journal*, &c., p. 478.

There is a show of honesty in the report as to the extract from Mr. Prescott's speech, as it is stated that he was opposed to the "unlimited retention of the power," but taking this and all the other extracts together, it cannot be questioned that the intention of the report is, to use the authority of the opinions of these distinguished men in support not merely of the power of removal, but of the odious, tyrannical and capricious use of it which the government is now called upon to make.

Now this report, and the volume showing the real character of the debates, are before the world, and is it not heart-sickening that it should be known that a committee of the legislature of this Commonwealth is capable of such conduct as is shown in the misrepresentations which we have just pointed out? We cannot and will not dwell upon the subject.

The attempt to incite the legislature to the exercise of irresponsible power, merely because they happen to possess it, is a matter worthy of serious reflection. This is the first attempt of the kind that has been made. In the few other cases, where the power has been exercised, it has been rightfully used for substantial reasons. In the case of Judge Bradbury, for the reason of physical incapacity, which, at the same time that it rendered him unfit to discharge the duties of his office, probably so affected him

intellectually as to disable him from resolving on the serious step of resigning on that account. Men in the state of debility to which he was reduced, are not, as a general thing, very competent to judge of their own condition, or willing to admit their weakness. In our own experience, in the public offices of this city, we could designate men holding on to offices which were essential to their support, but for which they had become unfit from mere superannuation without any moral fault, and, in such cases, it may be a necessary though severe duty to exercise this right of removal. In the cases of judges Vinal and Sargent, it appears from the report before us, that the action of the legislature had been preceded by, and was probably predicated upon, the verdict of a jury finding that they were guilty of offences which rendered their removal, even by impeachment, legal and proper.

It is not pretended that any such cause can be alleged against Judge Loring. Taking into view all the circumstances of the case, and the fact that he, and all the other commissioners, have been left unmolested in the exercise of the offices which they held under the State, it can hardly be said that his merely holding the office is the cause of dissatisfaction, neither can his acting as a commissioner under the law of 1850, be assigned as a reason for it. If the State has acquiesced in their servants holding the office, how can it object to their exercise of its functions, when it was well known that the statute required it when they were called upon, and that they could not escape from the requisition?

The case then reduces itself to this: That the excitement against Judge Loring, and the demand for his removal, is not owing to his holding office as a commissioner of the United States Court, nor to his sitting as such commissioner in the case of Burns. But it is owing to the determination that he arrived at, and to that alone. If he had discharged Burns, not one word would have been said about his violating the law of 1843, although the mere act of taking cognizance of such a case is as distinctly forbidden by the act, as a judgment adverse to the fugitive.

Now we hope it will be conceded by every man, that if Judge Loring assumed to take cognizance of a case under the law of 1793, or of 1850, (for which he has not been blamed,) he was bound by every consideration of common honesty and judicial integrity to render a judgment accord-

ing to the conviction that his mind arrived at on the case submitted to him. We have not heard that any one has ever said that Judge Loring's decision was a corrupt one; that he was influenced in the least degree by fear, favor, affection, or hope of reward. If the accusation has been made, we venture to say that not a man in this Commonwealth, in his sober senses, believes it.

The most, then, that can be said is, that he committed an error of judgment, and came to a wrong conclusion.

It is not necessary at this day, in Massachusetts, to argue that this is no cause for the impeachment or degradation of a judge. If it were so, every overruled case would afford cause for attacking the court or judge who made the first decision, or the old barbarous doctrine of attaint as applied to jurors, (3 Bl. Com. 401, ch. 25,) might be extended to bring within its danger every judge who delivered an unpopular opinion. Even supposing that Judge Loring's opinion was wrong, he was bound to adhere to and act upon it; if it were the honest conviction that the case led him to, he would be more justified in maintaining such an erroneous opinion than in holding the truth in unrighteousness by adopting a correct opinion contrary to his own conviction, merely because it happened to be a popular one. We presume that never man in this Commonwealth had such an opportunity for winning popular applause as was offered to Judge Loring when the judgment in the Burns case was yet locked up in his own breast. An argument might have been made in favor of the fugitive, which would have been plausible, and in accordance with the popular feeling, and we are not prepared to say that it would not have been correct on the law and the facts of the case. All honor, then, we say, to the judge who could resist such influences, and who could follow his own convictions when every consideration of personal interest and comfort, and all the feelings of a humane heart, drew him the other way.

If an attack upon a judge for an erroneous opinion is ever to be justified, it can only be when the opinion is so palpably wrong as to lead to the conclusion, or at least to the strong suspicion, of either incapacity or corruption.

But can any candid man entertain such an opinion with regard to Judge Loring's decision? Mr. Dana, while expressing his own opinion that the decision was erroneous, entirely acquits Judge Loring of everything but error in opinion. We do not intend to argue this question, but we

may be allowed to say, that it appears to us that the balance was nearly even, and that a judge deciding either way could not have been liable to a charge of incapacity, or have been convicted of corruption before any tribunal but that of Him who knoweth the secrets of the heart. But we are not certain that if the general opinion throughout New England of men unaffected by the political or moral bias by which the consideration of abstract questions in this case has been disturbed, could be ascertained, it would not be found that what our Quaker friends would call "the solid sense" of the profession would sustain Judge Loring's conclusion from the evidence before him. How dangerous then to attack a judicial officer under the pressure of popular excitement, for a decision of such a character as this!

The limits which are prescribed to us prevent our full examination of the minute and captious details which this rambling report sets forth. They are of little moment. But we will comment upon a few points touching the personal conduct of Judge Loring. As to the alleged violations of law, and the erroneous rulings and decision of the commissioner, we cannot enter upon their discussion, because, as we have endeavored to show, such allegations, even if true, ought not to affect a proceeding like this before the legislature. In a nicely balanced case, any judge may be wrong upon the law. The opinions of Judge Loring are, as we believe, generally sustained by the profession, and there is not the shadow of evidence that he acted, from beginning to end, from any other motive than from a high sense of duty.

1. Judge Loring is charged, upon the evidence of Mr. Phillips, as to a conversation between them, of having formed his opinion in the case before it had been fully heard. We are informed on good authority that such a conversation is explicitly denied by Judge Loring, and that Mr. Phillips must have misunderstood him, owing, probably, to the preoccupation of his mind. That the charge cannot possibly be correct may, we think, be shown. If Judge Loring made this remark, which he is accused of making, it could only have been because his opinion was formed upon Brent's testimony as to the identity of Burns. But, in point of fact, Judge Loring's decision was not predicated upon that testimony. On the contrary, he expressly declared that it was balanced in his mind by the evidence of an *alibi* offered for

the defence, and that his opinion as to the identity was formed upon the evidence of Burns' admissons in his conversation with Suttle.

2. The fact, that on Saturday night Judge Loring drew the bill of sale which Suttle had promised to sign, is brought up against him. We think it very probable that this is true. And what could be more natural and proper than that Judge Loring, a lawyer, placed in a distressing position with regard to this man, should be ready and willing to assist in contributing his aid towards carrying out an agreement made entirely between other parties, but the effect of which would be to relieve all parties from the uncomfortable situation in which they found themselves. Suppose Judge Loring had refused to draw this bill of sale, and the fatal 12 o'clock on Saturday night had arrived, and the negotiation had been arrested because the papers could not be completed in time. Would not the very partisans who now make this an article of charge against him, have taken another ground, and denounced him because he had been unwilling to expedite this arrangement, and preferred to sit in judgment and to send the man back by his decree? It appears to us that such a charge would have been much more tenable than the one now urged, and that, if he had refused to draw such a paper, he might well have been accused of throwing obstacles in the way of Burns's liberation. The objection that the drawing up of this bill of sale implies a decision in Judge Loring's mind that Burns was the claimant's slave is merely puerile. The respondent's case had not been then heard, but the claimant's evidence was in. It was enough that Judge Loring knew that the case was doubtful. Without having made up any opinion, he might well argue that the respondent's evidence might fail to be sufficient, and thus, with his mind completely in doubt, he might be willing to promote an arrangement by which Burns's friends were striving to change uncertainties into certainties. Nay, was not the proposal to purchase Burns an intimation that his friends (who must have been presumed to have the best knowledge) had not much confidence in the case they could make out, and was not Judge Loring imperatively called upon to respond to their request, and aid in placing Burns in a situation of absolute safety? If this charge is to be regarded, it is evident that the mere fact of a negotiation for the purchase of Burns, places Judge Loring in a dilemma from one alternative of which he cannot escape.

3. The objection to the display of an armed force during these proceedings is utterly unjust. Judge Loring had nothing to do with it, and could not help it. Burns was in his keeping. The statute of 1850 had made the marshal liable in damages for his escape. There was great danger of a rescue. The streets were heaving with an excited population. The court house had been attacked by a mob, and an assistant of the marshal had been murdered. Every consideration of interest and duty urged the marshal to keep Burns in safety, and he knew by experience that by the display of force alone could he do so. If the commissioner had ordered him to dismiss his guard, the marshal would have said, "This is my business and my risk. I must protect myself, and will not leave myself defenceless." The commissioner must have submitted to the refusal. Why, then, is he to be censured for a state of things in which he had no interest, and which was entirely beyond his control. The court house at the time was occupied by the United States courts, as well as by those of the State, and the former had all the rights of tenants in their own parts of the building, and the passages leading to them, and all their other appurtenances. We wish to speak distinctly on the fact that the commissioner had absolutely no control and no voice as to the keeping of the prisoner; that was a matter entirely and directly between the marshal and the government, — the statute of 1850, in this particular, acting directly upon the marshal, without the intervention of any other authority.

4. As to the objection that Judge Loring allowed his action as commissioner to interfere with the duties of his office as judge of probate. This is mere assertion. Judge Loring held his court on Monday, May 29th, and we have not heard from any quarter that any probate business was neglected, or any suitor denied a hearing on that day. The committee do not offer a particle of proof that any one sought and failed to obtain a hearing.

5. A vague attempt is made in this report to show that Judge Loring manifested a disposition to act hastily and to prejudge the case, and to send Burns back without a fair hearing. This is attempted to be proved in part by the evidence of Mr. Phillips as to his conversation with Judge Loring. We have already spoken on this point, showing that the conversation, as testified to by Mr. Phillips, is positively denied by Judge Loring; and showing, also, that

the progress of the case sufficiently shows that he did not, at the time of the interview, entertain the views which would have elicited the remark testified to by Mr. Phillips; and that, in fact, the only evidence on which he could have founded such a remark, was ultimately thrown out by him, and the case actually decided upon other evidence.

But the complete answer to this charge is to be found in Mr. Dana's speech before the committee, p. 15, *et seq.* Mr. Dana appeared before this committee to oppose Judge Loring's removal, not out of any particular sentiment of personal regard for the judge, (for, as he states, they had only a professional acquaintance,) but in the discharge of what he thought a public duty. He had no motive to palliate the conduct of Judge Loring, and, certainly, had he thought him obnoxious to a charge so grave and so injurious to his own client, he would never have attempted to screen him. Every manly and professional feeling would have induced him to aid in the exposure of such baseness, and forbearance in such a case would have been dishonest and uncandid weakness. We will, then, take Mr. Dana's testimony as that of an absolutely fair witness. Now this testimony goes fully and unequivocally to exonerate Judge Loring from this or any other charge of judicial misconduct during the hearing in the case of Burns. Mr. Dana's evidence shows, on the contrary, that Judge Loring's conduct towards the prisoner evinced throughout the most considerate humanity, and a kindness of which those who are acquainted with Judge Loring know to be characteristic of the man. That he was unwilling to urge Burns to a defence against his will, and against his own idea of his own interests, is admitted, and in this Mr. Dana shows that both he and Mr. Phillips agreed with him. This speech clearly shows, that it was the opinion of Mr. Dana, at the time when his feelings were all warm and glowing with the great issue that was intrusted to him, that Judge Loring, resisting all the open and whispered arguments that were addressed to him against it, carried through from the first to the last his determination that Burns should have a fair hearing; and, more than that, that it was chiefly owing to his instrumentality that the hearing was secured at all.

We have now gone over the principal points which have been made in the report before us. That we may

have omitted some of them is very possible, for the document is very discursive, and hardly any of its propositions are distinctly enunciated. That it is the manifestation of a foregone conclusion, that its writers came to their work with their determination already formed, we think must be evident.

That Judge Loring has violated no law of Massachusetts; that he had no reason to suppose that his acting as a commissioner in the Burns case would be offensive to the people of Massachusetts; that, in fact, it was not; that this persecution is owing not to such acting, but to his decision; that his conduct during the trial was distinguished by humanity, firmness and conscientiousness; that he has neglected no duty of his office as judge of probate; that no complaint has been preferred against him for any shortcoming in that office; that he is, in fact, in every way deserving of the confidence of the community; — these are facts which we fully believe, and which, we think, can only be denied by men whose moral vision is distorted by party prejudices. We fear that this violation of the judiciary department, this cruel injustice to the individual man, will be consummated, as has already been indicated by the votes of the House of Representatives, and the Senate. Be it so.

Non si male nunc et olim
Sic erit.

The party that made the attack on the judiciary in 1843, by reducing the salaries of the judges of the Supreme Court, never had much reason to boast of their success. In the very next year, probably from this very act, they were in a hopeless minority, and saw their work undone.

We think it obvious that the course which is now pursued against Judge Loring by the opponents of the United States law of 1850, is a very impolitic one, so far as the real interests of fugitives from labor is concerned. Whatever be the character of that law, — nay, the more unjust and oppressive its character, — it is for the interest of all except those who may wish to make political capital by agitation, that its application should be left in pure hands. The law of 1850 has been pronounced constitutional by the Supreme Court of Massachusetts and the Circuit Court for this district, and its enforcement is inev-

itable until it is repealed. Whenever cases may be presented under it, any commissioner who consents to act, may be compelled, if he is a man of any pretension to character, and is not prepared to oppose these decisions, to send back a fugitive.

As long as the law remains in force, men will be found who will act as commissioners, and exercise jurisdiction under it. The bar of this Commonwealth, and especially of the county of Suffolk, is not so select as it once was. There are as many good and true men at it as ever, but there are more of an inferior moral standard than there used to be. Now if every man who acts as a magistrate to enforce the law of 1850 is to be persecuted as Judge Loring has been, it is very easy to see that the commissioners must soon be a class by themselves, to whom the mere profits of the office will be a sufficient inducement to brave public opinion, and who will have a direct interest in every case in pronouncing against the fugitive, and with very little principle to deter them from pursuing that interest. When there is a law of such a nature on the statute book, that to pronounce decrees under it in favor of the claimant may be supposed to be the sure way to political favor at the South, and with the general government, and is also doubly more advantageous to the magistrate in a pecuniary point of view, it is all-important to have very pure and honest and strong men to administer it, lest they fall into temptation. The existing commissioners are, we believe, all of them men of entirely irreproachable private character. So far as we know, they are, every one of them, men whose whispered word would (excepting the accidents of life) be considered as good security as their sealed bond. Now if such men are driven out by party rancor from the offices which they hold, it is manifest that the vacated offices must be filled by descending to a lower level, and employing others of an inferior character. We have already been told of one case, and are informed that many others have occurred, where the commissioners have been applied to act under this law in a covert and unfair manner, and that they have refused so to act. This is no merit in them. But men might be in office who would not be so scrupulous, and whatever odious features there may be in the law might be aggravated by the mode of its administration. While the office of commissioner is filled by such persons as the present incumbents, there is no danger of this kind. We

hope they will continue so to be filled while the law remains in force.

In writing this article, we wish most expressly to disclaim expressing any feeling or opinion in favor of the United States law of 1850. We have been dealing only with the question of the violation of the judiciary department in Massachusetts. That while the constitution and Union endure, the South, under that constitution, are entitled to some law or some means to enable them to reclaim their fugitive slaves cannot be questioned. That the people of any one State are ready to give up the constitution and the Union on this issue we cannot, we are unwilling to, believe. But we do most sincerely dislike and object to the most odious provisions of this law. We would do as little in obedience to it as is possibly consistent with our duty as citizens, and as persons who, in various capacities, have sworn to obey the laws of the United States. We would strive and hope for its repeal or modification.

But Massachusetts will come to this work with an ill grace, if she come with the stigma upon her of having violated the integrity of her judiciary to serve the purposes of a party.

NOTES TO LEADING CRIMINAL CASES.

Rees Price *v.* Robert B. Seeley and Others.[1]

May 11, 1843.

Arrest by Private Person — Justification — Breach of the Peace.

A private person is not justified in arresting, or giving in charge of a policeman, without a warrant, a party who has been engaged in an affray, unless the affray is still continuing, or there is reasonable ground for apprehending that he intends to renew it.

A plea, justifying an arrest for an affray without warrant, ought to contain a direct averment that there was an affray or a breach of the peace continuing at the time of the arrest, or a well-founded apprehension of its renewal.

A plea of justification to an action of trespass for assault and false imprisonment,—after stating that defendants were in lawful possession of a yard, and were there erecting a wall by their servants; that plaintiff entered the yard, and upon the wall, and made a great noise, disturbance, and affray, ill-treated defendants, threw down their servants so employed, and obstructed the erection of the wall, in breach of the peace; then averring a requisition by defendants to plaintiff to depart, and his refusal and continuance; whereupon defendants and their servants gently removed him, and he violently resisted, and assaulted one of defendants in so

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[1] House of Lords, 10 Clark and Finnelly, 28.

doing.—proceeded thus: That plaintiff then and immediately afterwards, and just before the said time when, &c., with force, &c., again broke and entered the yard and got upon the wall, and again made a great noise, disturbance, and affray therein, and threatened to assault, insulted, and ill-treated and showed fight to defendants, and then again forcibly obstructed the further erection of the said wall, and threw down part thereof, &c., in breach of the peace; whereupon defendants, having view of the offences and misconduct of plaintiff last aforesaid, in order to prevent such breach of the peace &c., then and there gave charge of the plaintiff to a police constable, who then saw the misconduct of plaintiff to take him before a justice, and the policeman took him before a justice. *Held*, that these were sufficiently positive averments of a continuing breach of the peace from the commencement until the plaintiff was given in charge, or amounted to a necessary implication of a well-founded apprehension that it would be renewed.

THIS was a writ of error on a judgment of the Exchequer Chamber, which affirmed a judgment of the Court of Queen's Bench, under the following circumstances:—

In Easter term, 1839, the plaintiff in error brought an action against the defendants in error, in the court of Queen's Bench: the declaration contained two counts, the first stating an assault, battery, and false imprisonment of the plaintiff by the defendants; and the second stating an assault and battery.

The defendants severed in their pleas: the said R. B. Seeley and five other defendants, pleaded,—

1st. Not guilty to the whole declaration.

2dly. As to the second count, a justification (on which no question arose.)

3dly. As to the first count also, a justification, stating that four of them, with other persons, being trustees under an Act of 10 Geo. 4, for taking down and rebuilding St. Dunstan's church, were, as such trustees, lawfully possessed of a certain close or yard, with the appurtenances, situate and adjoining to Clifford's Inn, in the city of London, in which close certain persons, with the authority of the said trustees, were, before and at the said times when, &c,, constructing a wall, by Thomas Winney and Thomas Lee, their servants in that behalf; and the said trustees being so possessed, and the said servants being so employed, the plaintiff, just before any of the said times when, &c., in the said first count mentioned, came into the said close or yard, and upon the said wall so constructing, as aforesaid, "and then and there with force and arms made a great noise, disturbance, and affray therein and thereon, and insulted, threatened, abused, and ill-treated the said last-mentioned defendants so being such trustees as afore-

said, and also the said George Colk, one of these defendants, in the said close or yard respectively; and then with force and arms assaulted and pushed about and threw down the said T. Winney and T. Lee, being such servants employed in constructing the said wall as aforesaid, and then greatly disturbed and disquieted the said trustees in their peaceable and quiet possession of the said respective close or yard, and forcibly hindered and obstructed the erection of the said wall there, in breach of the peace of our lady the Queen; whereupon the last-mentioned defendants, R. B. Seeley, &c., being such trustees as aforesaid, requested the said plaintiff to cease his said noise, violence, hindrance, and disturbance, and to depart from and out of the said close or yard and wall respectively; which the plaintiff then wholly refused to do, and continued his said noise, violence, hindrance, and disturbance. The last-mentioned defendants, so being such trustees as aforesaid, then and just before the said times when, &c., in defence of the possession of their said close or yard and wall, and the said George Colk, Cyrus Elliman, and Thomas Eaves, as their servants in that behalf and by their command, and the defendants did gently lay their hands on the plaintiff, in order to remove, and did then remove the plaintiff from and out of the said close or yard of the said trustees, and off the said wall, as they lawfully might for the cause aforesaid; the plaintiff with force and arms violently resisted the said removal, and assaulted, beat, and ill-treated the said T. Eaves in so doing, in further breach of the Queen's peace: And the said defendants further say, that the plaintiff then immediately afterwards, and just before the said times when, &c., with force and arms, &c., again broke and entered the said close or yard, and got upon and over the said wall, and again made a great noise, disturbance, and affray therein and thereon, and threatened to assault, and insulted, and abused, and ill-treated, and showed fight to the defendants, being such trustees as aforesaid, and the said servants, in the said close or yard; and then again forcibly obstructed and hindered the further construction of the said wall thereon, and forcibly kicked and threw down a part of the same already built, and greatly disturbed and disquieted the said trustees in the peaceable and quiet possession of the said close or yard, in breach of the peace of our lady the Queen; whereupon the last-mentioned defendants, being such trustees as aforesaid, and having view of the said offences and misconduct of the plaintiff last aforesaid,

and the said G. Colk, standing by and also having such view as aforesaid, in order to preserve the peace, and to restore order and tranquillity, and to prevent such breach of the peace in the said close or yard respectively, and to proceed peaceably, quietly, and undisturbedly in the construction of the said wall, then and there gave charge of the plaintiff to the said T. Eaves, then being a police-constable of and for the city of London, who then saw and had view of the said misconduct and breach of the peace committed by the plaintiff as last aforesaid, and then requested the said policeman to take the plaintiff into his custody and carry him before some justice or justices of our lady the Queen, assigned to keep the peace in and for the said city of London, to answer the premises and to be dealt with according to law; and the said policeman, being such constable as aforesaid, at such request of the last-mentioned defendants, and the said Cyrus Elliman, in his aid and assistance and by his command, then and there gently laid hands on the plaintiff for the cause and purpose aforesaid, and did then and there take the plaintiff into custody and conduct him from and out of the said close or yard, in order to carry and convey him before such justice as aforesaid." The plea then proceeded to allege that the trespasses were committed in so doing and in overcoming plaintiff's resistance to the constable; with an averment that as little damage was done to plaintiff and his clothes as might be, and that the trespasses all took place in the city of London.

The defendant Eaves, a London policeman, pleaded,— 1st. Not guilty by statute.

2d and 3d. Justifications, on which no question is raised in this writ of error.

The plaintiff joined issue on all the pleas of not guilty, and replied *de injuria*, &c. to the special pleas; whereupon issue was joined.

The cause was tried before Lord Denman at the London sittings after Michaelmas term, 1839, when the jury found for the plaintiff in the general issue, with one shilling damages; and for the defendants on the pleas of justification. A motion to arrest the judgment was afterwards made, but the court directed the judgment to be entered for the defendants. The plaintiff brought his writ of error in the Court of Exchequer Chamber, where the judgment

of the Court of Queen's Bench was affirmed.[1] The plaintiff then brought the present writ of error in this house.

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Lord COTTENHAM: — It does not appear to us, Mr. Attorney, that we should call upon the defendants in error in this case. The law, as stated by Mr. Kelly from the judgment of Mr. Baron Parke, in the case of *Timothy* v. *Simpson*, is perfectly correct. The question is, whether this third plea comes within the rule of law there laid down? That plea states the forcible expulsion of the plaintiff from this ground, and then proceeds to allege that he "with force and arms violently resisted the said removal, and assaulted, &c., the said T. Eaves in so doing, in further breach of the Queen's peace: And the said defendants further say that the plaintiff then immediately afterwards, and just before the said times when, &c., again broke and entered the said close, &c., and again made a great noise and affray therein, and threatened to assault, and insulted, &c., and showed fight to the defendants, &c., and then again forcibly obstructed and hindered the further erection of the said wall, and forcibly kicked and threw down a part of the same already built, and greatly disturbed the said trustees, &c., in breach of the peace of our lady the Queen; whereupon the last-mentioned defendants, being such trustees as aforesaid, and having view of the said offences and misconduct of the plaintiff aforesaid, and the said Colk standing by and also having such view as aforesaid, in order to preserve the peace and to restore order and tranquillity, and to prevent such breach of the peace and to proceed quietly and undisturbedly in the construction of the said wall, then and there gave charge of the said plaintiff."

Now that appears to me to be going a great deal further than it need have gone, according to Mr. Baron Parke's judgment; for this is all one continued act. The party who makes this invasion of the premises, where the wall was being constructed, did not evidently desist from that breach of the peace in which it is admitted he was engaged. But being forcibly expelled from the premises, he again comes on them, again does that which the word "affray" is used to represent, threatens to renew the assault, and proceeds again with the work he had been originally engaged in when he was removed, namely, destroying the wall partly erected: all which acts are in the plea distinctly

[1] Law Jour., vol. 10; N. S. Ex. C. 543.

alleged to be against the peace of the Queen. Then the act which is the subject of the charge is stated: "Whereupon, in order to preserve the peace and to restore order and tranquillity," &c. The argument is, that the word "whereupon," coupled as it is with the subsequent statement, must be, or may be, intended to mean that the affray and breach of the peace had entirely ceased, and that after it had ceased the party was given in charge to the constable; a course of proceeding which a private individual is not entitled to adopt. But the allegation is, after narrating the facts amounting to a continued breach of the peace, that "whereupon," &c., to prevent the continuance of the disturbance, the party was given in charge. Now I apprehend that the statement there would amount to the allegation of a continued breach of the peace from the very commencement up to the moment when the party was given into custody. It amounts to that which is deemed sufficient, if the party at the time the arrest took place had ground to believe that a breach of the peace was either continuing or likely to be renewed. Here is a party who comes on the premises, commits a serious breach of the peace, is forcibly driven out, immediately re-enters, and continues the same description of conduct for which he had been previously removed. If language can express acts calculated to raise impressions that a breach of the peace was either to be continued or repeated, it does appear to me that those words amply amount to such an allegation; and, under the authority referred to, that would be sufficient to justify the arrest which took place. I therefore think that the judgment must be for the defendants in error.

Lord Campbell: — This appears to me to be a frivolous writ of error. I understand there was an application that the Queen's judges should be here, and it was supposed to be a matter of course that they should be here. Now your lordships are extremely anxious in a grave case, upon a question of common law, to have the assistance of those reverend sages of the law, and to pay great attention to them; although your lordships are not bound by their opinion. But to have summoned Her Majesty's judges on such a case as this would have been, as it appears to me, extremely preposterous. It should be understood that when there is a motive to summon the judges, and your lordships think their attendance necessary, they are generally summoned; but it is by no means necessary when there is a writ of error that the judges should be summoned.

It seems to me that the counsel for the plaintiff in error very correctly stated in the course of his argument what is the law on this subject. A private person is not justified in arresting any of the Queen's subjects, unless there be a breach of the peace continuing, or unless he has reasonable ground to believe that a breach of the peace, which has been committed, will be renewed: and it was stated, I think very correctly, that in a plea justifying an arrest and imprisonment, there ought to be a direct averment that there was a breach of the peace continuing, or that there was a well-founded apprehension of its renewal. When I look at this plea, I think that both are positively averred. I cannot at all dismiss from my consideration the first part of this plea; for I think with my noble and learned friend that this is to be taken as part of the same transaction, for there was no cessation at all of the conduct of the plaintiff, and it is positively averred that the plaintiff, "then immediately afterwards and just before the said times when, &c., with force and arms, &c., again broke and entered the said close, &c., and again made a great noise, &c., and threatened to assault, and insulted and abused and ill-treated and showed fight to the defendants;" which last is an expression I never saw in pleadings before, but the meaning of which I apprehend is pretty well understood: "and then again forcibly obstructed and hindered the further erection of the said wall, and forcibly kicked and threw down a part of the same already built, and greatly disturbed, &c., the said trustees in the peaceable and quiet possession of the said close or yard, in breach of the peace of our lady the Queen." Here is a positive averment that these acts were done in breach of the Queen's peace; and can it be contended that it is possible to have an affray not in breach of the Queen's peace? Then there can be no doubt that in that part of the plea all that is necessary is positively averred.

Now let us see whether the continuation of that breach of the peace at the time of the arrest is not likewise averred. The plea goes on thus: "Whereupon the last-mentioned defendants, being such trustees as aforesaid, and having view of the said offences and misconduct of the plaintiff last aforesaid, &c., in order to preserve the peace and to restore order and tranquillity, and to prevent such breach of the peace in the said close or yard respectively." Then a breach of the peace had been committed; whereupon, in order to restore tranquillity and to prevent such breach of the peace being renewed, the arrest took place.

Here is a positive averment that it was continuing; and further, if we could suppose that it had ceased, which I think there is no reason for supposing on this statement, there are facts which are abundantly shown from which it is not a mere matter of doubtful interference, but a necessary and inevitable implication according to the grammatical and usual sense in which language is employed, that there was a well-grounded apprehension that that breach of the peace would be renewed, and it was in order to prevent such renewal of it that the arrest took place. I am clearly of opinion that this writ of error is brought without reason, that it is frivolous and vexatious, and that there ought to be judgment for the defendants, with costs.

. . . . . .

The judgment of the court below was then affirmed with costs.

Twenty years prior to this decision in the House of Lords, the same law had been distinctly declared in America, in the case of *Phillips* v. *Trull*, 11 Johnson, 486, (1824.) That, like the above, was an action of trespass, alleging an assault, battery, and false imprisonment *for six days*. The defence was, in addition to *not guilty*, the following justification:

As to assaulting and imprisoning the plaintiff, and detaining him in prison for ten hours, part of the time in the first count mentioned, that the plaintiff and three other persons, being in a house occupied by one Elisha Fitch, made a great noise, affray, disturbance and riot in the said house, in breach of the peace, and because the defendant, being a laborer and lodger in the said house, at the request of the said Fitch, in attempting to keep the peace and stop the noise, &c., was assaulted by the plaintiff, he gave charge of the said plaintiff to one Curtis, to take him into his custody and keep him until he could be carried before a justice of the peace, to answer for the said breaches of the peace: and that, at the request and by order of the defendant, the said Curtis gently laid his hands on the said plaintiff, and took him into custody for the purposes aforesaid; but because it was midnight, and the plaintiff could not be immediately carried before a justice, he was necessarily detained in the custody of Curtis until the next day, and that he was, as soon as he conveniently could be, carried before a justice; and the defendant avers, that, by means of the premises, the plaintiff was necessarily imprisoned for the space of ten hours, part of the said time.

To this plea there was a special demurrer, which was sustained, and the plea held bad. PLATT, J. thus briefly announced the judgment of the court.

"All persons whatever, who are present when a felony is committed, or a dangerous wound is given, are bound to apprehend the offenders. 3 Hawk. P. C. 157. Arrest, § 1. So any person whatever, if an affray be made, to the breach of the peace, may, without a warrant from a magistrate, restrain any of the offenders, in order to preserve the peace, but, after there is an end of the affray, they cannot be arrested without a warrant. 2 Inst. 52; Burns' Justice, 92.

Hawkins (3 Hawk. P. C. 174, b. 2, § 20,) says: 'It seems clear that, regularly, no private person can, of his own authority, arrest another for a *bare breach* of the peace, after it is over.'

We are of opinion, that the special plea of justification is bad; and the plaintiff is, therefore, entitled to judgment on the demurrer."

As a private person cannot, therefore, *after* a breach of the peace, arrest the offender, so it seems he cannot do so to *prevent* such a misdemeanor. *Wheeler* v. *Whiting*, 9 C. & P. 262, (1840). But his power to arrest *during* an affray is widely different. *Timothy* v. *Simpson*, 1 Cromp., Mees. & Roscoe, 757 (1835), is the leading case on that side of the question. The facts there were these: —

The defendant was a linen draper; the plaintiff was passing his shop, and seeing an article in the window with a ticket apparently attached to it denoting a low price, sent his companion in to buy it; the shopman refused, and demanded a larger price; the plaintiff went in himself and required the article at the lower rate. The shopman still insisted on a greater price; the plaintiff called it "an imposition." Some of the shopmen desired him to go out of the shop, in a somewhat offensive manner; he refused to go without the article at the price he bid for it; the shopmen pushed him out. Before they did so, he declared he would strike any one who laid hands on him. One of the shopmen, really supposing, or pretending to suppose this to be a challenge to fight, stepped out and struck the plaintiff in the face, near the shop door; the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part, and fell on the plaintiff. There was a great noise in the shop, so that the business could not go on — many persons were there, and others about the street door. The noise brought down the defendant, who was sitting in the room above. When he came down, he found the shop in disorder, and the plaintiff on the ground, struggling and scuffling with the shopmen; and this scuffle continued in the defendant's presence for two or three minutes. The defendant sent for a policeman, who soon afterwards came; in the mean time the plaintiff was taken hold of by two of the shopmen, who, however, relinquished their hold before the policeman came; and, on his arrival, the plaintiff was requested by the defendant to go from the shop quietly; but he refused, unless he first obtained his hat, which he had lost in the scuffle. He was standing still in the shop insisting on his right to remain there, and a mob gathering round the door, when the defendant gave him in charge to the policeman, who took him to the police station. The defendant followed: but, on the recommendation of the constable at the station, the charge was dropped. "Upon these facts," said the court, "the plaintiff appears to have been, in the first instance, a trespasser, by refusing to quit the shop when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman; that led to a conflict, in which there were mutual acts of violence clearly amounting to an affray, the latter part of which took place in the defendant's presence; and the plaintiff was on the spot on which the breach of the peace occurred, persisting in remaining there under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police-officer in the very place where the affray had happened.

The first question which arises upon these facts is, whether the defendant had a right to arrest and deliver the plaintiff to a constable, the police officer having, by the statute 10 Geo. 4, c. 44, § 4, the same powers as a constable has at common law. It is not necessary for us to decide in the present case whether a private individual, who has seen an affray committed, may give in charge to a constable who has not, and such constable may thereupon take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased,

after the offenders have quitted the place where it was committed, and there is no danger of its renewal. The power of a constable to take into his custody upon the reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now, as to the authority of a constable, it is perfectly clear that he is not entitled to arrest, in order himself to take sureties of the peace, for he cannot administer an oath. *Sharrock* v. *Hannemer*, Cro. Eliz. 376; but whether he has that power, in order to take before a magistrate, that *he* may take sureties of the peace, is a question on which the authorities differ. Lord Hale seems to have been of opinion that a constable has this power. 2 Hale's Pleas of the Crown, 89. And the same rule has been laid down at *Nisi Prius* by Lord Mansfield, in a case referred to in 2 East's Pleas of the Crown, 306; and by Buller, J., in two others, one quoted in the same place, and another cited in 3 Campb. N. P. C. 421. On the other hand, there is a *dictum* to the contrary in Brooke's Abt. 'Faux. Impt.' 6, which is referred to and adopted by Lord Coke in 2 Inst. 52.

Lord Holt, in *The Queen* v. *Tooley*, 2 Ld. Raym. 1301, expresses the same opinion. Lord Chief Justice Eyre, in the case of *Coupey* v. *Henley*, 1 Esp. 540, does the same. And many of the modern text books state that to be the law. Burns's Justice, 26th edit., 'Arrest,' 258; Bacon's Abt. D. 'Trespass,' 53; 2 East's Pl. of the Crown, 506; Hawkins's Pleas of the Crown, book 2, c. 13, § 8. Upon the present occasion, however, we need not examine and decide between these conflicting authorities; for here the defendant, who had immediately before witnessed an affray, gave one of the affrayers in charge to the constable on the very spot where it was committed, and whilst there was a reasonable apprehension of its continuance; and we are of opinion that he was justified in so doing, though the constable had seen no part of the affray. It is unquestionable that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. Lambard, in his Eirenarcha, c. 3, p. 130, says: 'Any man also may stay the affrayers until the storm of their heat be calmed, and then may he deliver them over to a constable to imprison them till they find surety for the peace; but he himself may not commit them to prison, unless the one of them be in peril of death by some hurt, for then may any man carry the other to gaol till it be known whether he, so hurt, will live or die, as appeareth by statute 3 Hen. 7, c. 1.' In Hawk. P. C. book 1, c. 63, § 11, it is said, that it seems agreed that any one who sees others fighting may lawfully part them, and also stay them until the heat be over, and then deliver to the constable, who may carry them before a justice of the peace, in order to their finding security for the peace; and pleas founded upon this rule, and signed by Mr. Justice Buller, are to be found in 9 Went. Plead. 344, 345; and De Grey, C. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it?

Both cases fall within the same principle, which is, that for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of

violence, and the danger of their renewal continued, the affray itself may be said to continue; and *during the affray* the constable may, not merely on his own view, but *on the information and complaint of another*, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable. (Lord Hale, P. C.) The defendant, therefore, had a right in this case, the danger continuing, to deliver the plaintiff into the hands of the police officer, unless the circumstance that the plaintiff was not guilty of the first illegal violence made a difference. Now, at the time the defendant interfered, he was ignorant of that fact; he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighborhood, and the persons of all those concerned, from violence; and if he had the power to arrest all, he was justified in securing any one, not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the other to keep the peace, as upon a review of all the circumstances he might think fit. If no one could be restrained of his liberty, in cases of mutual conflict, except the party who did the first wrong, and the bystanders acted at their peril in this respect, there would be very little chance of the public peace being preserved by the interference of private individuals, nor, indeed, of peace officers whose power of interposition on their own view appears not to differ from that of any of the King's other subjects. For these reasons we are of the opinion that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police officer."

Great caution is, however, necessary that what occurred as the occasion of the arrest, was strictly a *breach of the peace.* See *Ingle* v. *Bell*, 1 Mees. & Welsb. 516, (1836); *Cohen* v. *Huskisson*, 2 Ib. 477, (1837); *Baynes* v. *Brewster*, 2 Queen's Bench, 375, (1841); *Grant* v. *Moser*, 5 Man. & Grang. 123, (1843).

And proof of annoyance and disturbance by a person present at a public temperance meeting, such as crying "Hear! Hear!" and putting questions to the speaker, and commenting upon his statements, which interrupted the speaker, and diverted the attention of the meeting, but without any assault, or other disturbance, will not justify the chairman of the meeting in giving the intruder into charge of the police. *Wooding* v. *Oxley*, 9 Carr. & P. 1, (1839) But see *Burton* v. *Henson*, 10 Mees. & Welsb. 105, (1842), where a parish clerk having been dismissed from his office by the rector, though irregularly, and another appointed, the former entered the church before divine service had commenced, and took possession of the clerk's seat; it was *held*, that the church wardens were justified in removing him from the clerk's desk, and also out of the church, if they had reasonable grounds for believing that he would offer interruption during the celebration of divine service.

A private individual who undertakes to arrest another, must not only be prepared with *evidence* that there was a breach of the peace, but that fact must be directly and positively *averred* in a special plea of justification. See *Grant* v. *Moser*, *supra*. For a private individual cannot, like an officer, avail himself of this defence under *the general issue*. *McCloughan* v. *Clayton*, 1 Holt, 478, (1816.) The reason of the difference may be, that the individual having no official duty to discharge in making the arrest, is *prima facie* a trespasser, and must throw off the presumption thus resting upon him, by putting his defence specifically upon the record. The cases above cited show how strictly such plea is scrutinized. Thus in *Grant* v. *Moser*, the plea alleged that A. *with force and arms* came to B.'s door, *and with great force and violence* attempted to enter against B.'s will, and wilfully and wantonly rang the door-bell without lawful occasion, and

made a great noise and disturbance, to the annoyance and disturbance of B , and *against the peace of the Queen*, and so continued to do, wherefore B. gave him in charge to an officer, in order to *preserve the peace*. On demurrer, this plea was held bad for not alleging *directly* either a breach of the peace, at the time of the arrest, or that one had been committed, which there was reasonable ground for apprehending its renewal, Chief Justice Tindal saying that the words "against the peace of our Lady the Queen" were but *verba sonantia*. See also *Wheeler* v. *Whiting*, 9 Carr. & P. 262, (1840); *Williams* v. *Croswe l*, 2 Carr. & Kir. 422, (1846); *Webster* v. *Watts*, 11 Queen's Bench, 311, (1847.) In this case, the plea stated that the plaintiff was making a noise and disturbance opposite the defendant's house, using loud and menacing language to him and his family, and that by reason of such conduct, while he stood there, many persons congregated in the highway and made a disturbance and riot there, near to and opposite the door of the house, in breach of the peace, and to the obstruction of the defendant's business, and of the highway. This plea was held sufficient, WIGHTMAN, J., saying the plaintiff was creating a public nuisance, and must have been doing so in the officer's view, for the acts appear to have been done just before the officer took him.

If a private individual may arrest another during *an affray*, or breach of the peace, *a fortiori* may this be done during the commission of a *felony? Rex* v. *Hunt*, 1 Moody, C. C. 93, (1825.) And also to *prevent* the commission of a felony. *Handcock* v. *Baker*, 2 Bos. & Pull. 260, (1800.)

But to justify a private individual, acting for himself alone, and not under the direction or command of any officer, in arresting and detaining another for a *past* offence, two things must concur, which the party arresting must prove at his peril.

First. A felony must in fact have been committed by *some* person.

Second. Such private person must have had reasonable cause to believe the party arrested the guilty person.

First. *A felony must have in fact been committed by some person.*

The honest suspicion of the commission of such a crime will afford no protection to the party who makes the arrest. The strictness of proof required of the defendant in such case is well illustrated by the case of *Hedges* v. *Chapman*, 2 Bing. 523, (1825.) The defendant there had missed a horse out of his premises, and believing him to have been stolen, and finding him in the plaintiff's stable, gave the plaintiff in charge to a constable, who imprisoned him. Thereupon the plaintiff brought trespass for assault, battery and false imprisonment. It was held that there was no defence, since it appeared only that the defendant had had a horse *taken* out of his field, — not *feloniously* taken, and therefore the plaintiff had judgment. See also *Moore* v. *Watts*, Breese, R. 18, (1822), that a charge must import a felony to justify proceedings for an arrest.

So in *Stonehouse* v. *Elliott*, 6 T. R. 316, (1795), the defendant's pocket had been picked in a playhouse, and the plaintiff being suspected as the person, was given in custody by the defendant to an officer, but it being ascertained that the defendant was wrong in her suspicions of the plaintiff, he sustained trespass against her for the imprisonment. The main question mooted in this case was, whether trespass or case was the proper form of action, and it does not appear whether the defendant was held inexcusable because no *felony* had been committed, or because she could not prove she had reasonable grounds to suspect the plaintiff of the act; but the case well illustrates that the person who takes upon himself to arrest another, must make out a full and complete justifictaion. And in this respect there is a wide difference between a private individual and an

officer. Lord Tenterden, in *Beckwith* v. *Philby*, 6 Barn. & Cress. 638, (1827), thus expresses his views of the difference: —

"There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities." See also the opinion of Lord Mansfield in *Samuel* v. *Payne*, Douglass, 360, (1780.)

The same principles have been frequently recognized in this country. In *Holley* v. *Mix*, 3 Wend. 353, (1829), it was declared that "if a felony has, in fact, been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal." And in *Wakely* v. *Hart*, 6 Binn. 316, (1814), it was said: "When there is only probable cause of suspicion, a private person may without warrant, at his peril make an arrest. I say at his peril, for *nothing short of proving the felony, will justify the arrest.*"

The party arresting, therefore, must not only *prove* the felony, and probably the same degree of proof would be requisite as on a criminal charge, but the crime proved must amount in law to a technical *felony*.

The known commission of any minor offence, will not authorize an arrest. There is no distinction or degrees in misdemeanors for this purpose, and although the misdemeanor committed be obtaining goods from the party arresting by false pretences, it will not justify such person in giving the person suspected into the charge of an officer. *Fox* v. *Gaunt*, 3 Barn. & Adol. 798, (1832.) There was no positive proof in this case that any crime, even a misdemeanor had, in fact, been committed by any person. But the whole case proceeds upon the ground, that even had such been the fact, no right to arrest was given; there being a broad distinction between felonies and misdemeanors. *Mathews* v. *Biddulph*, 4 Scott, N. R. 54, (1841), is to the same effect. The crime charged there was fraudulently attempting to procure from the defendant, a banker, a check-book belonging to a third party; but as this was no felony, but only a misdemeanor, it was therefore held no justification for the arrest.

And here again it becomes exceedingly important to know what crimes are felonies, and what are not; in many American States the distinction between felonies and misdemeanors has been clearly and sharply drawn by statutory provisions, which generally enact such crimes to be felonies as *may be* punished by death, or imprisonment in the state prison.

But where no such positive provisions exist, the question is one not free from embarrassment, and has given rise to considerable doubt and difficulty in arriving at a satisfactory conclusion. In *Rohan* v. *Sawin*, 5 Cush. 281, it was held that receiving stolen goods, knowingly, was such a felony as would justify an arrest without a warrant. The court, in *Wakely* v. *Hart*, 6 Binney, 316, incline to the same opinion, but do not decide the question. See also *The King* v. *Wyer*, 2 Term R. 77, (1787.)

On the other hand, adultery is not, *at common law*, a felony, and a husband or other person who has the most positive proof of the guilt of his wife's paramour, cannot, at common law, arrest and detain the guilty party, not even until a warrant can be obtained; at least, not without subjecting himself to an action for an assault and false imprisonment. This

may seem inconsistent in the common law, that the thief of the most paltry sum may be seized and imprisoned without hazard or risk of prosecution in a civil action, but that he who has robbed a husband and a father of what a husband and a father holds most dear, may escape with impunity before the injured party has opportunity to lay the case before a magistrate, and obtain an officer to arrest the offender. But this results necessarily from the rule above laid down, that felony is the only crime for suspicion of which a private person may arrest another, and that adultery is not a felony. *State* v. *Cooper*, 16 Verm. 551, (1844.) Neither was perjury a felony at common law. *Anon.* R. M. Charlton, 228, 232, (1822.) Nor an assault with intent to murder. *State* v. *Boyden*, 13 Iredell, 505, (1852.) But a fuller consideration of the distinction between felonies and other crimes is reserved for a future note.

Second. *The person arresting must allege and prove he had reasonable grounds for believing the party arrested to be the guilty person.*

That the grounds of suspicion ought to be fully set forth in a special plea of justification, see *Williams* v. *Crosswell*, 2 Car. & Kir. 422, (1846); *Wasson* v. *Canfield*, 6 Blackford, 406, (1843.) What facts will justify a reasonable belief that the party accused was guilty, must, of course, vary with the peculiar circumstances of each individual case. The suspicion ought always to be a *reasonable* one, founded on pregnant circumstances. *Mere suspicion* will not suffice. *Findlay* v. *Pruitt*, 9 Porter, 195, (1839.) It has generally been thought a question of *law* whether the facts proved amount to such reasonable grounds for belief; thus in *Mure* v. *Kay*, 4 Taunt. 34, (1811), it was held that the plea must show the peculiar circumstances under which the arrest was made,, in order that the *court* may judge of their reasonableness. And it was there held on *demurrer* to a plea of justification setting out the facts, that, *as matter of law*, the plea was insufficient, and the plaintiff had judgment. And the same rule must prevail, if the plaintiff does not see fit to demur, but the cause goes to the jury. It is for the jury to determine simply the truth of the facts stated in the plea, and such facts as may be directly inferred from them, but not whether those facts amounted to reasonable and probable cause, and if such a question be left to them it is a misdirection, for which the verdict may be set aside. *West* v. *Baxendale*, 9 Com. Bench, 141, (1850); *Panton* v. *Williams*, 2 Q. Bench, 169, (1841), an elaborately considered case in the Exchequer Chamber. The propriety of this rule was thus indicated by Tindal, C. J. "Upon this bill of exceptions," said he, "we take the broad question between the parties to be this: whether, in a case in which the question of reasonable or probable cause depends not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge? And we are all of opinion that it is the duty of the judge so to do.

In the more simple cases, where the question of reasonable and probable cause depends entirely on the proof of the facts and circumstances which gave rise to and attended the prosecution, no doubt has ever existed, from the time of the earliest authorities, but that such question is purely a question of law, to be decided by the judge. In *Coxe* v. *Wirrall*, Cro. Jac. 193, and in *Pain* v. *Rochester*, Cro. Eliz. 871, each of which were actions on the case for falsely and maliciously procuring the plaintiff to be indicted for felony, the defendant in each action set forth in the plea, the facts and circumstances that induced him to indict; and the plaintiff, hav-

ing in each instance demurred, it was the court which had to determine, as a matter of law, and not the jury as a matter of fact, whether the statement in the plea did or did not form a sufficient excuse. And in the case last referred to, the very distinction now under consideration, was laid down by the court, upon the objection then taken, that the plea amounted to the general issue only; the court holding it to be a good plea, "*per doubt del lay gents*," for that the defendant "confessed the procurement of the indictment, and avoided it by *matter in law*." And, although the practice which then obtained has been altered for a great length of time, by introducing into the declaration, not only the statement that the charge was false and malicious, but also that it was made without reasonable or probable cause, and thereby compelling the plaintiff to give some evidence thereof, and enabling the defendant to prove his case under the plea of not guilty, — yet the rule of law, that this question belongs to the judge only, and not to the jury, is not, by such alteration in pleading, in any way impaired. And, still further, the authorities collected in the case of *Sutton* v. *Johnstone*, 1 T. R. 493, and the authority of that case itself, and also the decision of BUTLER, J., there cited, prove incontestably that it is a question for the jury, whether the facts brought forward in evidence be true or not; but that what is reasonable or probable cause is matter of law. There have been some cases in the later books which appear at first sight to have somewhat relaxed the application of that rule, by seeming to leave more than the mere question of the facts proved to the jury: but, upon further examination, it will be found that, although there has been an apparent, there has been no real departure from the rule. Thus, in some cases, the reasonableness and probability of the ground for prosecution has depended, not merely upon the proof of certain facts, but upon the question, whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. Again, in other cases, the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not; in other cases the inquiry has been, whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable or probable cause. But, in these and many other cases which might be suggested, it is obvious, that the knowledge, the belief, and the conduct of the defendant are really so many additional facts for the consideration of the jury; so that, in effect, nothing is left to the jury but the truth of the facts proved, and the justice of the inference to be drawn from such facts; both which investigaitons fall within the legitimate province of the jury, whilst, at the same time, they have received the law from the judge, that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution, or the reverse.

And, such being the rule of law, where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is, undoubtedly, attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts, and inferences from facts, are made out to their satisfaction. But it is equally certain that the task is not impracticable: and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them." See also *Wasson* v. *Canfield*, 6 Blackford, 406, (1843.) See *Broughton* v. *Jackson*, 11 Eng. Law & Eq. R. 386, where, however, Lord Campbell regretted it had been

treated so much as a question of law. The cases therefore of *Guppy* v. *Brittlebank*, 5 Price, 525; *Beckwith* v. *Philby*, 6 Barn. & Cress. 635; *Davis* v. *Russell*, 5 Bing. 354; *Wedge* v. *Berkeley*, 6 Adol. & El. 663; *Nicholson* v. *Hardwicke*, 5 Car. & Payne, 495; where this question was left to the jury, without *objection*, cannot be considered as *authorities* that such is the law.

And this is in strict analogy with the question of probable cause in an action for malicious prosecution, where it has always been considered a mixed question of law and fact, that is, it is a question of fact whether the circumstances alleged as showing probable cause, really existed; and a question of law, whether, supposing them to exist, they amount to probable cause. See *Johnstone* v. *Sutton*, 1 T. R. 510; affirmed in the House of Lords, 1 Brown's R. C. 76, and the valuable note in 1 American Leading Cases, 219. To amount to "a justification" there must be both an *actual belief* or suspicion on the part of the person arresting, and also *reasonable grounds* for it. *Mere* belief and good faith is not sufficient. *Hall* v. *Suydam*, 6 Barb. 84, (1849); *Winebiddle* v. *Porterfield*, 9 Barr, 137, (1848); *Hall* v. *Hawkins*, 5 Humph. 359, (1844.)

There must also be such facts and circumstances as to *warrant a cautious man* in the belief that the party arrested was the real offender. See *Wilmarth* v. *Mountford*, 4 Wash. C. C. 82; *Broad* v. *Ham*, 5 Bing. N. C. 722.

To be determined by the facts known at the *time of the arrest*. *Thomas* v. *Russell*, 25 Eng. Law & Eq. R. 550, (1854); *Swaim* v. *Stafford*, 3 Iredell, 289, (1843); *Wills* v. *Noyes*, 12 Pick. 324. See *Reg.* v. *Dadson*, 1 Eng. Law & Eq. R. 566.

We have before said that although an individual must prove a felony to have in fact been committed, before he can fully *justify* an arrest, and that evidence of probable cause to believe the plaintiff guilty, will be no *bar* to an action for the arrest, yet some courts hold such evidence admissible in *mitigation of damages*. *Chinn* v. *Morris*, 2 Carr. & Payne, 361; *Wasson* v. *Canfield*, 6 Blackford, 406, (1843.) And see *McKenzie* v. *Allen*, 3 Strob. 546, (1849); *Russell* v. *Shuster*, 8 Watts & Serg. 308, (1844.) But the general bad character of the plaintiff is never admissible in mitigation in such cases.

The general principles of the preceding note are nowhere more clearly and comprehensively stated than by Lord Hale, 2 Pleas of the Crown, 78.

But to make good such a justification of imprisonment, says he,

1. "There must be in fact a felony committed by some person; for were there no felony, there can be no ground of suspicion.

2. The party that arrests (if a private person), must suspect the person arrested to be the felon.

3. He must have had reasonable cause of such suspicion, and these must be alleged and proved." E. H. B.

Recent American Decisions.

District Court of the U. S. for the District of Massachusetts, December Term, 1854.

THE CARGO OF THE BARQUE MISSOURI.
A. T. LEACH ET AL. *Libellants*; SUN MUTUAL INS. CO., OF NEW YORK, *Claimants.*

Salvage — Claim of Owners and Crew — Effect of Fraudulent Acts by the Master — Lien for Salvage Service — Salvage on Property not restored to the Owners by the Acts of the Salvors alone.

A vessel had been saved from going to pieces on the rocks, with the aid of the master and crew of another vessel, and was stranded. While the property on board was in the process of transportation to the other vessel, with their aid and still in danger, the master of that vessel engaged in a fraudulent conspiracy with the master of the other vessel to appropriate to their own use a portion, not designated, of the property saved. Part was thereafter remitted to the owners. The master of the salving vessel brought a part to a home port and concealed it. It was subsequently discovered by other persons, and seized on a libel in behalf of the owners and crew of the salving vessel, for salvage.

And it was *held*, that the fraudulent conduct of the master did not defeat their claim; that they were entitled to salvage both on the property concealed and on that remitted, and had a lien on the former for the salvage due on both.

THIS was a libel in behalf of the owners and crew of the ship Sterling, of Salem, Henry C. Pitman, master, for salvage on a large amount of specie, and some other property, taken, and alleged to have been saved from the barque Missouri, of New York, Samuel N. Dixey, master, when wrecked on the coast of Sumatra. The master and first and second mates of the Sterling were not parties to the libel.

In October, 1850, the Missouri and Sterling were lying together in Rigas Bay, waiting to take in cargoes of pepper; each with a large amount (the Missouri some $24,000) of specie on board. In the afternoon of October 31st, the Missouri got under way to leave the bay, but was taken aback at the entrance of the harbor by a head wind, and let go her anchor. The next morning she was riding with one anchor, very near a high rocky bluff, and as the libellants' witnesses testified, with a heavy sea running, and a

gale blowing on shore. Capt. Pitman came on board about 10 A. M., and remained a half hour or an hour and then left, after making an arrangement that Dixey should hoist a signal in case he wished to get under way. In the afternoon about 4 o'clock, the Missouri still riding with one anchor, a signal was hoisted, and Pitman, with four men, came to the Missouri. Just before he reached her, the cable parted; another anchor was let go, but the cable of that also parted. Pitman and his men assisted in making sail on the vessel. She weathered the point and came into a bight between two rocky bluffs, with a sandy beach about half a mile long, the wind and sea setting in upon the beach. They attempted to tack, but owing to the chains under foot she missed stays. The kedge was thrown out but came home, and she went stern on upon the beach.

A large amount of specie was removed to the Sterling that night, and either the night of the wreck, as the claimants contended, or the next morning, as the libellants admitted, while the alleged salvors or some of them were still engaged in saving articles from the wreck, Pitman and Dixey agreed to appropriate about two-thirds to their own use, to restore the remainder to the owners, to obtain salvage thereon, and report that the Malays had stolen the remainder; part of which the libellants contended they did actually take.

No attempt was made to get the Missouri off at any time. The Sterling proceeded to Analaboo, where Dixey procured another vessel, which he manned with his crew, and sailed for Penang, taking with him part of the specie, and part he left on board the Sterling, in charge of Capt. Pitman. After their separation, Dixey remitted to his owners, in New York, by bills of exchange, the sum of $7,355.18.

Pitman completed his cargo and arrived at Holmes' Hole in the winter of 1851. When there, he went on shore and secretly buried in the sand a large amount of specie.

Subsequently, Pitman and Dixey were indicted, for stealing and plundering from the Missouri on the Coast of Sumatra. Dixey pleaded guilty, and Pitman was tried and convicted at the March term of this court, A. D. 1852. Before this, information having been obtained in regard to the burial of the money, a reward was offered, and about $7,500 was discovered near Holmes' Hole, brought to Boston, and placed in the custody of the court. Against this specie the present libel was filed. On the trial of the pres-

ent case, a great deal of evidence was introduced, bearing upon the conduct of Pitman and Dixey, in regard to the management of the vessel and the disposition of the specie, the danger incurred from the Malays, the probability that any of the specie fell into their hands, the burial of the money at Holmes' Hole, the expense and trouble incurred in recovering it, &c. This evidence it is not necessary to give in detail. The conclusions of fact reached by the court appear in the opinion.

R. H. Dana, Jr. for the libellants.

This argument is not reported, as the points and authorities will be found sufficiently referred to in the opinion of the court.

Rufus Choate, and *Geo. S. Hale*, for the claimants, suggested that there were circumstances in the case which gave rise to the suspicion that the Missouri might have been purposely wrecked, and as to this referred to the authorities cited to the other points.

No salvage is recoverable, because the loss was occasioned by the negligence of Pitman, agent of the owners of the Sterling. *The Duke of Manchester*, 4 Notes of Cases, 575; *Shersby* v. *Hibbert*, 5 Ib. 470; *The Neptune*, 1 W. Rob. 297. The negligence which will defeat a claim for salvage is not necessarily gross negligence but ordinary negligence, for a person of the experience and occupation of the alleged salvors. *The Cape Packet*, 3 W. Rob. 125; *The Dygden*, 1 Notes of Cases, 115.

No claim for salvage can be entertained, because the specie was taken from the Missouri *animo furandi*. No title to property or right to compensation can be acquired for any one by a violation of law. *Ex dolo malo non oritur actio. Jus ex injuria non oritur. Non debeo melioris conditionis esse quam auctor meus a quo jus in me transit.* (Broom's Legal Maxims, 571.) An attachment effected by illegally breaking the defendant's door is invalid. *Ilsley* v. *Nichols*, 12 Pick. 270.

A common carrier has no lien on goods unlawfully put into his hands and transported. *Robinson* v. *Baker*, 5 Cush. 144.

By the general principles of salvage, the act on which the claim is founded must be lawful. *Talbot* v. *Seeman*, 1 Cr. 3, 28; *The Alerta*, 9 Cr. 359, 367; *The Bee*, Ware, 332, 339; *The Florence*, 20 Eng. Law and Eq. R. 607, 616; *The Barefoot*, 1 Ib. 661; *Clark* v. *The Dodge Healy*, 4 Wash.

C. C. 651; *Rowe* v. *The Brig —— and Cargo*, 1 Mason, 372, 379; *The Adventure*, 8 Cr. 221, 227; *The Fleece*, 3 W. Rob. 279; *The Blenden-Hall*, 1 Dods. 414. And see Laws of Oleron, Art. 25, in 1 Pet. Adm. Dec. App. p. xxxix.

The right to salvage is founded on enlarged principles of public policy, as a reward to noble conduct. It is designed to encourage honesty, and discourage fraud. *The Boston*, 1 Sum. 328, 339, 341; *Talbot* v. *Seeman*, *supra*; *The Emulous*, 1 Sum. 207, 210; *The Henry Ewbank*, Ib. 400, 413. But where the act, without which there is no salvage, is in itself a gross crime, these principles forbid a reward.

It is every where admitted that embezzlement or gross misconduct forfeits a vested claim for salvage as against the guilty party. What, then, is the ground of the owners' claim to salvage, independent of the guilty master. Admitting that an embezzlement by him, subsequent to the vesting of a salvage claim by meritorious acts, might not affect their right, still, when the act of crime is inseparable from the salvage service, and the disposition made of the property saved is designed to carry out a felonious purpose, the nature of the act defeats any claim for salvage, or, to speak more correctly, no claim for salvage can arise.

Here, the libel alleges that this salvage service was by the removal to the Sterling (with the previous acts of the salvors); but this removal was larceny, it was a felonious trespass.

What then is the foundation of the owners' claim? The early English authorities do not seem inclined to favor it. It has been said, "The master and crew are in strict language the only salvors;" that "in former times, before the introduction of steam vessels," their claim was only "incidentally" allowed to be entertained. Cases where the ship herself rendered considerable service were considered as a sort of exception. Dr. Lushington says, the owners of a steam vessel "may come in and make a claim as owners of the vessel, *incidental* to the claim of the master and crew." *The Beulah*, 2 Notes of Cases, 61; *The San Bernardo*, 1 Rob. 178; *The Vine*, 2 Hagg. 1; *The Salacia*, Ib. 264; *The Charlotte*, 3 W. Rob. 72; S. C. 4 Notes of Cases, 281; *The Two Friends*, 2 W. Rob. 349. Thus we contend, their claim is recognized as derivative and incidental, arising from, and depending on, the master's act.

The crew may stand on a different footing from the owners. They labor with their hands; they incur personal haz-

ard, and their claim may be considered as original and independent, and, therefore, be not affected by a fraud like that here committed, while that of the owners is defeated by it.

Here, it has been held by STORY, J., that the master has an implied authority from the owners to save property. *The Nathaniel Hooper*, 3 Sum. 542, 579. And the same Judge says, "a salvage crew cannot by any shuffling or management deprive the owners of their right to share in the salvage. *They must take or lose in common with the latter.*" *The Henry Ewbank, supra*, 419; see *The Robert*, 3 Rob. 202; and in *The Britain*, 1 W. Rob. 40, it is held that the master may bind his owners by an agreement to do salvage service for a specified sum. Salvage service, then, is in the course of his employment, and the owner is responsible for acts done in the course of such employment, though wilful and malicious, criminal and not authorized. *Dias* v. *The Revenge*, 3 Wash. C. C. 262; *Ralston* v. *The State Rights*, Crabbe, 43; *Die Fire Damer*, 5 Rob. 357.

The act, whatever it is, is the foundation of their claim. *Qui sentit commodum sentire debet et onus.* Adopting the act, they adopt its consequences, and such ratification is equivalent to a previous authority. Broom's Leg. Max. 553, 557, 679.

Would the owners have a claim for salvage if Pitman and Dixey had wilfully cast the Missouri away, with the design, which it is admitted they formed and attempted to carry out afterwards, of appropriating a part not designated to themselves. The specie would be in as much danger and the owners as innocent as now. But it would be an outrage on every principle of justice and sound policy, to permit a felon to recommend himself to his employers, and afford a motive to them to protect him against his crime, by securing a large reward for them by that crime, and to enforce, by the aid of a court of justice, compensation for an act which is part of a scheme of defiance of all justice.

Gross negligence of salvors, pending the salvage, forfeits the owners' claim for previous meritorious services. *The Duke of Manchester, supra.* Why not larceny of the property saved? In the cases of *The Florence*, and *The Barefoot*, the owners' claim was held to be forfeited or prevented by the alleged acts of the master and crew, if proved.

The Rising Sun, cited by libellants, was purely a case of subsequent embezzlement, *i. e.* subsequent to meritorious acts, by which it may perhaps be said, the claim for salvage had vested. It does not appear as matter of fact in *The*

Boston, or *The Blaireau*, cited by the libellants, that the embezzlement was committed before the property saved reached a place of safety. In *The Blaireau*, it was held immaterial whether it was committed before or after reaching the port of Baltimore, as to the question then before the court, but Judge Marshall said: "The fact must have occurred before he parted with the possession acquired by the act on the merit of which his claim for salvage is founded."

There can be no claim for salvage on the money remitted. The felonious taking applied to the whole sum and infected the whole transaction. The remitting was part of the fraud, designed to assist in concealing it; furthermore, the remedy for salvage on that is only by a libel *in personam* against the owners to whom it has been delivered. *Lewis* v. *The Elizabeth & Jane*, Ware, 43; *Brevoor* v. *The Fair American*, 1 Pet. Adm. Dec. 87; *Nicolai Heinrich*, 22 Eng. Law and Eq. R. 617.

And for the salvage, if any, due on this, there is no lien on the rest. When this specie was taken out by the claimants, they entered into a stipulation to pay the sum decreed by the court as salvage. On what? Only on the specie for which they stipulated. If salvage on $15,000 can be decreed here, when $7,500 have been seized on the libel, the stipulators might be held to pay more than the value of the property libelled, which can never be intended. And see *The Ooster Ems*, cited in *The Two Friends*, 1 Rob. 271, 284; *The Progress*, 1 Edw. 210; *Houseman* v. *The North Carolina*, 15 Pet. 40; *Cutter* v. *Rae*, 7 How. 729.

But there is no claim for salvage on the specie found at Holmes' Hole. It is well settled that salvage is only due on property actually saved, however meritorious the services of the salvors. *Clarke* v. *The Dodge Healy*, *supra*; *The Ranger*, 3 Notes of Cases, 590. And when the salvors having performed salvage services abandon the property, they forfeit their claim. *The India*, 1 W. Rob. 406.

This specie was abandoned — not restored to the owners, but abstracted from them and concealed. The true salvors are those who dug it up on the island. It was recovered solely by their exertions and those of the claimants, without any assistance from any one of the libellants, and if the whole matter had been left to them, it would never have been recovered.

If any salvage is given here, it must be small. There was no deviation, no risk, no loss of time, little labor, and

a large deduction must be made for the expenses incurred by the claimants in recovering the specie, and for the articles not restored.

SPRAGUE, J., delivered the opinion of the court, in substance as follows:

There is no doubt that the Missouri and cargo were in peril at the time referred to, and in a condition to be the subjects of salvage service; that the libellants rendered a salvage service in taking from the vessel a large quantity of specie, a large part of which has come to the possession of the claimants. The safety of this specie is owing to voluntary exertions of the seamen of the Sterling, and to the use of the Sterling herself. But the claimants insist that there are facts here which defeat this claim; that there was a fraudulent conspiracy by the masters of the two vessels to embezzle part, at least, of the money. It is not denied that there was a conspiracy, a fraud and actual embezzlement; but it is contended by the libellants, that those only who participated in that fraud should suffer for it, and that the innocent should not bear the penalty. The research and learning of the counsel have produced no case where the courts have gone further than to inflict that punishment on the guilty; none where they have gone so far as to decide that others not personally implicated in the offence shall forfeit their right. Two cases are relied upon, *The Florence* and *The Barefoot*. In the former, there was no misconduct and no forfeiture. In the latter, the vessel having been sunk on the coast, several small vessels from the shore interfered, and obstructed the owners of the cargo in their endeavors to save it. The owners of these vessels did not assert their innocence, and it was not even suggested that the wrongful interference was without their assent.

But it is insisted, that the circumstances of this case go beyond any which has as yet been reported, on the ground that the act here performed on which the libellants' claim was founded, was fraudulent in its inception.

It is urged that it is not a case of subsequent embezzlement, but of a fraudulent conspiracy in the beginning that the property should be originally taken for a fraudulent purpose; that as Captain Pitman had the control of the Sterling and her crew, and intended by his acts to commit a fraud, the owners and crew as well as himself, can claim only through a fraud, which the law does not allow. And this, certainly, deserves consideration. I think it clear, and indeed it is not distinctly contended otherwise, that there

was no fraud or misconduct previous to the stranding. The proof is, that the skill and labor of Pitman and his men assisted materially in saving the vessel from total wreck. As to the precise time when the fraud was commenced, it is said it did not arise until the day after the wreck. Whether it was then or on the night of the wreck, the objection is answered by the consideration that the salvage service began still earlier, in saving the vessel and cargo from total loss upon the rocks. With respect to the time of the conspiracy, the evidence shows that after the stranding of the Missouri, and before the removal of the specie, while it was in preparation for removal, the appropriation of it to their own use by the masters was suggested, and Pitman says the only objection he made was the danger of discovery. I am satisfied that, although at that time there was no settled plan as to the division of the money, yet that the proposition was so far entertained that night, that Captain Pitman acceded to measures designed to conceal the real quantity of specie, and to a misrepresentation of the quantity, which would be a means of deceiving others. I cannot but consider their whole conduct as intended at the time, at least, to place themselves in a position to avail themselves of an opportunity to appropriate the specie. I think Pitman was willing to wait and see if it could be done, and, if so, to join in the crime. I think his intention was to keep the course of proceeding in his own power, and that must affect his conduct, so as to give it the character of a fraudulent transaction on his part, from the time of the first suggestion by Dixey.

Therefore, so far as the facts are concerned. I find that before the specie was fully transferred, and while it was in process of transportation, there was a fraudulent conspiracy designed to be carried into effect, if means could be found for concealment, and that the parties did subsequently carry it into effect.

I shall now consider the two different funds to which this claim relates.

First, as to the sum of $9000 which it is said the parties intended to restore to the owners. That was taken from the Sterling by Dixey, and the greater part of it transmitted to them. That was originally saved, avowedly, for the owners, and came to their use; but it is insisted that no salvage is due on that, because it was contaminated by the general fraudulent intent. But shall that defeat the claim of the crew and owners? Why should the crew be de-

prived of their reward? It is said because the master entered into a fraudulent conspiracy; but it is not pretended that they participated in it. What is their condition? The vessel was stranded. They went on board, rescued the specie, transported it to the Sterling, and delivered it to the agent of the owners. This was the service of the crew aided by the vessel.

A claim for salvage rests on two grounds — individual justice and public policy. Why should the crew be deprived of it on either ground? Their services were faithfully rendered, and, on the ground of private justice, their claim is the same as in any other case. As to public policy — that policy generally favors the preservation of property. It is for the interest of all mankind that property should be preserved. It is the policy too of every country that its own property should be preserved. Its preservation is beneficial, into whatever hands it falls; but the original owner must never be divested of more than that policy requires. What I have not seen satisfactorily laid down in the books and have endeavored to discover, is the principle upon which the amount payable to the owners of the salving vessel and the actual salvors is determined. I think the true principle of the salvage reward is to give a sufficient inducement to render the service promptly, perseveringly, and honestly. This accords both with public policy and the true interest of the owners.

It must be remembered that salvage is a contingent compensation. The policy of the law is to afford an inducement to exertion, where it is as yet unknown what reward will be secured, and in cases where success may not finally reward exertion. Without this, there will be nothing but motives of humanity operating upon the mind.

Sometimes great exertions are made and great hazard and loss incurred without success, and public policy requires that such a promise of reward should be held out that the sailor, who alone sees from the mast-head a vessel in distress, or the master who descries her at a distance with a telescope, unknown to all on board, shall not be tempted to pass her by, but shall have a prospect of pecuniary advantage, which may prompt his efforts.

Why then deprive the seamen of their reward because another man has acted with an improper purpose? If, indeed, his fraud is so carried out that the property is not restored, they lose that reward; but for another reason, viz.: because their efforts are not ultimately successful.

There is, however, a technical argument: that they claim through the master and under him. But salvage service is voluntary. The master has no authority to compel seamen to engage in it. I do not mean to say they may not be bound to act under his orders if they engage in the service, but the service itself is voluntary.

But I think the salvage service did not begin with the removal of the specie. It began when they went on board, and assisted in making sail on the Missouri to weather the point. There was a salvage service in thus relieving the vessel and cargo from the imminent peril of going on the rocks — continued by saving the cargo and part of the appurtenances of the vessel.

This was, undoubtedly, in aid of the Missouri's crew, but that is unimportant. Dixey continued to be master so long as they remained on board the Missouri. The only thing that can be said to vary this from other cases, is, that possession continued in Dixey until they got on board the Sterling. Then the possession was in Pitman and his crew, because Pitman was in command, and Dixey was under his control. If Dixey was assigned, as it is argued, a particular part of the cabin, and the key placed in his charge, still I do not think that changes the legal or equitable aspect of the case.

The salvage service therefore was honestly performed by the crew, and then the property was intrusted by them, as perhaps they were obliged to intrust it, since they could not control it on board the Sterling, to the custody of Pitman.

As to the right of the owners of the Sterling, it is argued by the claimants that, in the cases where salvage was allowed to the owner, but forfeited by the guilty party, the embezzlement took place after the property had reached a place of safety. I do not find that question raised in the cases, and do not see why the cases cited by the libellants' counsel do not cover this point. See *The Ship Blaireau*, 2 Cranch, 240; *The Boston*, 1 Sumner, 328; *The Rising Sun*, Ware's Rep. 378. In all these cases, the embezzlement was while the property was in the care and custody of the salvors. There is no difference in principle between embezzlement before and after the property has been brought to a place of safety, and while still in the possession and control of the salvors, but it is contended that the master is the agent of the owners, and that it is a general principle, that if a claim must be sustained by the proof of fraud, the law will not entertain it. But is that so here?

What had the owners to do with the fraud? Nothing. It was not authorized by them. The truth is, the acts of Pitman were as much of a fraud on the owners of the Sterling as on those of the Missouri, and intended to deprive them of their share of the salvage. Why should the owner of one vessel say to those of the other, our agents conspired to commit a fraud, and you shall lose by it for my benefit. But I do not rest the decision on this alone. I do not think there is any sound distinction between this and the other cases.

It is said the whole claim is through Pitman. How so? He had the power to use their property, but it does not set up or sanction his fraud for them to claim a reward for the salvage. There was an original service by the owners as much as by the mariners. Their ship was used; the time of the crew, paid for by them and their provisions were used. The whole service was co-ordinate. The men could not act without the ship, nor the ship without the men. The right to salvage accrues from the use of the vessel.

In the early English decisions, the courts seem reluctant to acknowledge the rights of owners, and in some cases have magnified the claims of the master at their expense, attributing to him the whole merit of the use of the vessel, without considering whether it was by the authority or assent of the owners or not — but the true view is to regard him as being permitted by the owners to use their property. If he does so, and loses their vessel, it is their loss, and he is not called upon to make it good. The owners consent to and authorize the salvage of the property, but not that he should secrete or embezzle it. That is not his agency, and when he does that, it is without their sanction. It is a matter of public policy to hold out to them an inducement to permit the master to use their vessel. If they should instruct him not to save property, he would be bound by their orders, and would run all the hazard of loss. But they will so instruct him if the law does not give them such a reward, that not only a full indemnity, but a sufficient pecuniary inducement is secured to them.

Now the probability of the reward is an element to be weighed as well as the amount, but by the doctrine now contended for, in addition to the ordinary contingencies of salvage service they must run the risk of the master's honesty.

As to the $9000, my opinion is, that the owners are en-

titled to salvage on that amount, or on so much of it as was restored.

With respect to the portion recovered at Holmes' Hole, I have had more difficulty. That did not come to the owners' use by the mere act of the salvors. It was concealed on board the Sterling, was separated from the rest with the knowledge of Pitman only, brought to Holmes' Hole, and there buried, and has come to the owners' hands by other means. And the question is, whether the right to salvage was lost. I have reflected on this, and have come to the conclusion that it does not defeat the claim.

The property must be saved, the salvors must contribute to the salvage, and the property must come to the owners' use, or within their reach. Here the property was saved from impending peril, and has come to the use of the owners. To be sure, the salvors have not personally delivered it. The captain has embezzled it, or at least attempted to do so, and endeavored to deprive them of it. He did not succeed, and it is now in the hands of the claimants. The merit of the owners and seamen is the same as if no fraud had been attempted by the master; — the public policy is the same. Had Pitman succeeded in his fraudulent attempt, no salvage would have been due, because the property would never have reached its owners. This case, indeed, does not present the equitable claim in the strongest manner. Suppose a ship sunk on the other side of the globe; another vessel goes to the spot, raises her, and though having a right to bring home her cargo, puts it on board a third vessel, whose captain and crew attempt to embezzle it, but unsuccessfully, and it finally comes to the hands of the owner. Shall the original salvors be deprived of their reward? I see no principle of justice or policy which requires it.

I think salvage on the $7500 is due, and that there is a lien on that for the whole salvage. On the point that the lien is on each part for the whole, I have no doubt. It would be extremely inconvenient to say to salvors, you must retain the whole of the property saved, to preserve your lien for all your salvage. It is for the interest of the owners that no more of the property should be withheld from them than is necessary to secure the salvor's lien.

In determining the amount of salvage to be given, it is to be borne in mind that there was no deviation or detention of the Sterling, which could affect her insurance or delay her voyage, as she was at her anchorage waiting for

the pepper crop, and the services of the crew were of short duration, and attended with no particular hazard.

The amount on which salvage is to be given is fixed by agreement, at $15,103.91.

It appears that all but six of the crew have been settled with.

I award to the owners $600; to each seaman who was on board the Missouri when she went ashore, $88; to each of the other seamen, $53.

It appears that $18 was paid to each of the crew by Captain Dixey, at Analaboo, and receipts taken, expressed to be in full for labor and services. It is contended that this is a bar to their recovery. Upon all the testimony, I do not think it can be properly so treated. But the $18 must be deducted from the salvage decreed to each man.

Decree accordingly.

District Court of the United States for the District of Michigan. In Admiralty.

THE STEAMER FASHION.

MOORE & FOOTE, *Libellants;* HENRY L. NEWBURY, *Claimant.*

Lien for Materials — Waiver of Lien — Effect of taking a negotiable Note.

A receipt of payment by a note is not conclusive, but only *prima facie* evidence of payment.

A clerk invested with general authority to collect debts, presented a bill for supplies which were furnished on the credit of the vessel and the debtor, not denying the claim — said he was not then able to pay. On a subsequent application, the clerk expressed his willingness to take a negotiable note if a certain third person would join in the note, and said he would then give the debtor the time desired, but if this were rejected, he should be compelled to attach the vessel. The note was given, and a receipt given of "payment by note." The note was indorsed by libellants — cashed the same day, and not being paid at maturity, returned to them, and was now produced in Court and offered to be cancelled.

Held, that the original debt was not extinguished, and that the lien on the vessel was not waived or abandoned.

This was a libel, *in rem*, for supplies against the Fashion. The facts appear in the opinion of the Court.

WILKINS, J. The clerk of the libellants, invested with a general authority to collect debts, presented a bill for the

amount claimed, to the respondent, on the 22d of May last, 1854, and demanded payment. The respondent, not denying the accuracy of the account, stated that he was not able at the time to make payment. At a subsequent interview, the clerk renewed his application, expressed his willingness to take a negotiable note for the amount, if a certain individual, whom he named, would join in the same, and that *then* he would extend to respondent the time desired, but that, if this proposition was rejected, he would be compelled to attach the vessel.

The note indicated was procured by the respondent, received by the clerk, and the account adjusted by a receipt given, in this language :

"Received payment by note.

"MOORE AND FOOTE,
"By G. F. BAGELY, *Clerk.*"

This note, being indorsed by the libellants, was, on the same day, cashed at a broker's office, and not being paid at maturity, was returned to them ; is now exhibited in court, and offered to be cancelled.

This libel is exhibited on the original account. The answer alleges payment, and denies the existence of the maritime lien. Such being the facts, two questions are presented:

1st. Was the original debt extinguished by the note ?

If not, 2dly. Does the transaction show an abandoment or waiver of the lien ?

The Circuit Court for the United States, for this district, in *Allen* v. *King*, 4 McLean, 128, and in *Weed* v. *Snow*, 3 McLean, 265, has settled the law for this court, namely, that a receipt of payment by note is not conclusive, but only *prima facie* evidence of the payment of the debt, and that such evidence may always be explained by other extraneous circumstances, showing the intention of the parties when the receipt was given, and that there was, in fact, no actual payment of the debt. This renders unnecessary the consideration of the conflicting decisions in other States. This court will follow the rulings of the Circuit, as long as they are unreversed by the Supreme Court of the United States, Most of the cases cited were considered in *Allen* v. *King*, and there is nothing in this receipt which takes it out of the ruling in that case.

Here there is no proof of an agreement that the note should discharge the pre-existing debt, and no proof that

it should not so operate. Our judgment must rest on the intention, as manifested by the conversation and conduct of the parties at the time. The receipt, unexplained, as in *De Graff* v. *Moffatt*, cited by the respondent's proctor, would have been conclusive.

The proofs exhibit these facts: The master was not able or not willing to pay when the account was first presented. He did not contest the sum due. But he wanted time, as a convenience to himself. The agent or clerk was willing to give time on certain conditions. With this spirit of accommodation the note in question was procured and received. The statement of the clerk, that, unless the proposed arrangement was acceded to, the vessel should at once be attached, can, by no fair principle of construction, be held to signify his design to receive the note as absolute payment, and an extinguishment of the debt. Moreover, it appears that the agent was only authorized to collect debts. He had no power to exchange securities, especially a higher for one of less grade, — a security *in rem* for one merely *in personam*. Such power is not necessarily implied in a simple agency to collect. And, certainly, the cashing of the note by the broker was solely on the strength of the contract of indorsement. Had the intrinsic credit of the drawers been sufficient, the face of the obligation would have been otherwise.

Holding, therefore, that the note, independently, was not a satisfaction of the debt, the only question remaining is, — Was the lien abandoned by the libellants' receiving the note, and thus recognizing the act of the clerk?

It is to be observed that, as the transaction took place in Chicago, the libellants did not, in fact, receive the note, but only the money raised by its discount, when it was too late for them to disavow or repudiate the transaction.

Where materials are furnished a vessel, the credit is given either to the owner, the captain, or to the ship, and the law creates the lien on the latter. Such lien, however, may be waived, either at the time the materials are furnished, or be abandoned by a subsequent agreement, expressed or implied, on the part of the creditor. He may, at his option, look to other security, and, if so, no lien attaches to the ship.

In the case of *De Graff* v. *Moffatt*, so confidently relied upon, the contract, at the time it was entered into by the parties, *embraced a credit by the notes of the respondent.* After the libellant had closed his proofs, the respon-

dent introduced in evidence a settlement between the parties — an account current in the handwriting of the libellant — in which sundry promissory notes were credited and admitted as cash. This account was balanced, and, for the sum remaining due, a receipt in full was given, being expressed at the foot of the account as a payment by note, which was not produced or offered for cancellation. No evidence was introduced showing any understanding modifying or contradicting this receipt, and it was, of course, held, as in *Allen* v. *King*, *prima facie* evidence of payment. Besides, the original agreement, as shown by the account, certainly waived all lien upon the vessel.

Although a note under certain circumstances will not operate as an extinguishment of the debt, yet, when the creditor accompanies the act of receiving it in payment with the manifest *intention* to take it as his sole security, and not to look to the ship, such intention, clearly expressed or certainly implied, operates as an abandonment of the lien which the law gave him. Such an intention was not manifested in this case. There was no understanding to release the vessel. It is true that she was not yet attached by process; and it is true the clerk threatened it; but it is alike true that, at the interview between the clerk and the respondent, *all the latter wanted was further time to pay the debt.* The former wanted the money due; and, under these circumstances, the note was given and taken.

But if the note was not taken with the understanding that it was absolute payment, can it be inferred that it was received as additional security? If it was, it would not help the respondent's defence. He pleads payment, and relies upon a change of securities. The note was not a higher security than the ship. Why, then, collateral, or why a change? There can be but one answer. The note was received to raise the money at the time for the mutual accommodation of the clerk and the respondent, by placing the former in possession of funds which he *then* needed, and extending to the latter further time to meet an acknowledged obligation then due. This intention of the parties is too obvious to be disregarded or overlooked. The one did not receive the note in discharge of the lien; the other did not give it with such an understanding. The intention must govern. The note was to be payment, if paid at maturity; if unpaid, all the relations of the parties as to the vessel and the debt, remained unchanged. The cir-

cumstance, so ingeniously pressed, that the note was cashed, and the libellants thereby received the amount of the lien, (which then ceased and could not be revived,) does not materially vary the transaction, or exhibit a different intention. The note gave thirty days' time to the respondent. Until that time elapsed, the vessel could not be attached. Why? Certainly not because the debt was paid, or the lien waived, but because the note and its discount evidenced an understanding to await its maturity, and the default of the makers to meet it.

It was in proof that the note was discounted on the indorsement of the libellants. That it was never paid by the respondents, but by the former, fully appears by their present possession. The witness stated that the note was returned by the indorsees, who had cashed it in May last, and that the libellants were charged with the amount in their account current with the broker. In other words, the note, when due, was lifted by the libellants.

In cases of this description, the material man is not to be deprived of any of his remedies, except upon the most conclusive proof, that exclusive credit has been given to other security than the owner, the master, or the ship. Looking to either of the former, to the exclusion of the latter, releases the lien, but must be clearly established. In no case will either be released, except such was the manifest intention of the party. The maritime law guards, with most scrupulous care, its various subjects. The material man, the furnisher of supplies, and the mariner, are equally protected.

That credit was originally extended to the vessel in this case, is not questioned. The schedule appended to the answer, reads:

"Steam Boat Fashion,

"To Moore & Foote, Dr.

"To merchandise rendered on account."

To this the receipt is attached upon which the defence is based. So that the lien was in existence and recognized the day the note was given. There is no proof that it was ever waived — no proof of an intention to waive it.

The court was forcibly impressed during the hearing with the fact that the instrument was negotiable, and had been discounted, and that, therefore, as the libellants had received the money, their relation to the vessel had ceased. But the subsequent production of the note, and its tender for cancellation, removed all difficulty as to sustaining

the lien. This note is not now outstanding. No innocent indorsee can be affected by the decree, nor can it be discovered how sustaining the libel on the principle stated will peril vessels hereafter by secret liens. The purchaser of a ship, or any vessel, afloat, purchases with the presumed knowledge of the existing legal responsibilities. The note and the lien cannot both be sustained. While the one is still current as cash, or outstanding, the other is without force or vitality; but, if the former is itself dead, and as waste paper, the legal existence of the latter is not impaired. Here, the ship contracted the debt. That debt never has been paid. The note was but a promise to pay —a broken promise. It was made and accepted with the sole view to an extension of time. Certainly in this tribunal, as a court of equity, the respondent cannot complain of being dealt with inequitably by a decree enforcing payment of the debt of the boat from the boat; a debt not denied, either in its character or amount.

Decree for the entire claim and costs, and the cancellation of the note on payment of the decree.

Alfred Russell, for libellants, Moore & Foote.

John S. Newberry, for respondent.

Miscellaneous Intelligence.

Personal Identity. — It was stated yesterday in the Traveller, that on the testimony of the captain of a vessel and six of his crew, a man named James Guard, had been arrested by the police on the charge of attempting to rob a vessel, but was afterwards released on its appearing that he could not be the man, as on the night of the robbery he was safely slumbering in the watch house of the North End, where he had repaired for lodging. It was also stated, that on Monday night a body was found in the water at the end of Commercial wharf, which an officer of the North station testified before a coroner's jury was the body of the unfortunate James Guard, who but a night previous had been so falsely charged with crime, but who, nevertheless, appeared to have rather suddenly come to a tragic end.

The coroner's jury had no doubt, from the testimony of the officer, that the body was really that of James Guard, and they returned a verdict in accordance thereto, stating that "James Guard came to his death by accidental drowning." Thus the matter was deemed and considered to be settled, when last night, as the aforesaid officer sat meditating in his office at the station house upon matters connected, no doubt, with the city's

welfare, the door slowly opened, and what appeared to be the body of James Guard entered. In these days, a police officer is not apt to be a believer in ghosts, but, for a moment, thoughts of that character flitted through his brain. A request for lodgings, uttered in no ghostly tones, awakened him to a sense of reality and an explanation ensued, when it appeared that James Guard, who had been once charged with robbery, and on the oath of a coroner's jury with having been picked up drowned, was in reality alive and kicking, with sufficient love of the things of this world to receive with gratitude the gift of a soup ticket presented to him by the penitent police officer. Thus, the body now lying in the dead-house is not that of James Guard, but of some one who so closely resembled him as to have been mistaken for him by a dozen persons. It is, probably, fortunate for the living, that this "Dromio," who might have continued to work mischief for him, has really deceased. It is, certainly, a strong case of personal resemblance. — *Boston paper.*

Swallowing a Writ. — In Newington Church is buried Mr. Serjeant Davy (d. 1780.) He was originally a chemist at Exeter, and a sheriff's officer coming to serve on him a process from the Court of Common Pleas, he civilly asked him to drink; while the man was drinking, Davy contrived to heat a poker, and then told the bailiff that if he did not eat the writ, which was of sheepskin and as good as mutton, he should swallow the poker! The man preferred the parchment; but the Court of Common Pleas, not then accustomed to Mr. Davy's jokes, sent for him to Westminster-hall, and for contempt of their process committed him to the Fleet Prison. From this circumstance, and some unfortunate man whom he met there, he acquired a taste for the law; and on his discharge he applied himself to the study of it in earnest, was called to the bar, made a serjeant, and was for a long time in good practice. — *Timb's Curiosities of London.*

"A Candle of the Lord." — It is said that as an eminent member of the Suffolk Bar was cross-examining a witness the other day, he asked him what profession he followed for a livelihood? The witness replied, "I am a candle of the Lord, — a minister of the gospel." "Of what denomination?" asked the counsellor. "A Baptist." "Then," said his questioner, "you are a dipt, but I trust not a wick-ed candle."

Enforcing Foreign Judgments in France. — The following is an extract from the judgment of the First Chamber of the Civil Tribunal of the Seine, on this subject: — "The Tribunal, having heard the conclusions and pleadings of Blondel, counsel, assisted by Ploeque, attorney for Abrahams; Quétand, counsel, assisted by Lacroix, attorney for Harris; the conjoint conclusions of M. Marie, substitute for the Attorney-General; and after having deliberated conformably to law, judging in first resort: whereas article 546 of the Code of Civil Procedure, which ordains that judgments given by foreign tribunals shall not be capable of receiving execution in France, but so far as they shall have been declared executory by a French tribunal, makes no distinction between judgments pronounced between French persons and foreigners, and those pronounced exclusively between foreigners; that there is reason to conclude from these general terms that the French tribunals take cognizance of all demands having for their object the obtaining the putting in execution in France a judgment emanating from foreign judges, whatever may be the nationality of the parties concerned. Whereas the obligation imposed on the French tribunals to exercise jurisdiction in such matters can never be considered as an attack upon their rights of examination and control; the thorough revision of the dispute which the tribunal before which it is brought makes, before

authorizing or refusing the execution of the judgment deferred to its decision, having precisely the effect of preventing all derogation from the preceding laws. Whereas, regarded in this light, a demand of the nature of that which is this day brought before the tribunal, does not present the features of a cause brought before it by one foreigner against another foreigner, — a cause which a French tribunal is always at liberty to accept or decline the cognizance of, — as those of a suit terminated by a definitive judgment pronounced in a foreign country between foreigners, judgment whereof the execution is demanded in France on these grounds: The tribunal declares itself competent, retains the cause, and is adjourned for a fortnight to be fully pleaded. Condemns Harris to the expenses of the incident payment whereof to Pleoque, who has required it. Given and judged by Messrs. Martel, President; Berthelin, Chauveau Lagarde, Coppeaux and Gallois, judges. — In presence of M. Marie, substitute, 11th March, 1854." — *Law Times.*

Notices of New Books.

REPORTS OF CASES argued and determined in the Court of Common Pleas for the City and County of New York, with Notes, References, and an Index. By E. DELAFIELD SMITH, Counsellor at Law. Vol. 1. New York. Jacob R. Halsted, Law Bookseller and Publisher. 1855. pp. 871.

The cases reported in this bulky volume, as we learn from the preface, commence mainly with those decided in 1850. A few decisions of earlier date are inserted, and the volume is brought down to Jan. 1853, the reports of cases under the New York lien law, including, however, all the decisions of the court in proceedings under the Act of 1851, which have had the concurrence of a majority of the court at general or special term to December, 1854. Judge Daly has contributed an account of the judicial tribunals of the State of New York from the time of its settlement, which we should think would be of much interest to all students of American or judicial history. The New York Court of Common Pleas is an important tribunal. Its jurisdiction is extensive and dignified, while the multitude of questions which must arise in the great centre of American trade, cannot fail to comprise many of interest in all quarters of the Union, and we think Mr. Smith has done good service in preserving the decisions of the court. His volume strikes us quite favorably from our hasty examination, and we recommend it to the profession, with the hope that he may be encouraged to continue his labors.

ENGLISH REPORTS IN LAW AND EQUITY, vol. XXV.; containing cases in the House of Lords, the Privy Council, the Courts of Common Law, and the Admiralty and Ecclesiastical Courts, during the years 1853–54. Boston: Little, Brown & Co. 1855. pp. 674.

This useful series of Reports has reached its twenty-fifth volume. We notice that the English Court of Common Pleas has put a limit upon the curiosity of common carriers, by deciding in the case of *Crouch* v. *The London and North Western Railway Co.*, p. 287, that they have no general right, in every case, and under all circumstances, to require to be informed of the contents of packages tendered to them to be carried. The case of *Dansey*

v. *Richardson*, relates to the interesting subject of the liability of a boarding-house keeper for the loss of the goods of a guest; but we regret that it does not leave the law upon that point so well settled as is desirable.

In our March number we published some comments on this case from the London Law Magazine. That article contained a singular error, which is, perhaps, to be attributed to a *lapsus plumæ*, in alluding to the famous decision of Lord Holt in *Coggs* v. *Bernard*, as emanating from Lord Mansfield.

A Compendium of Mercantile Law. By the late John William Smith. Third edition, greatly enlarged and revised throughout from the last English edition. By James D. Holcomb and William G. Gholson. New York: D. Appleton and Company. Nos. 346 & 348, Broadway. 1855.

The value of this book is attested by the number of editions through which it has passed. This is the third American edition, and we know not how many there have been in England. It is a work of too high and well known character to need any further notice from us than the mere announcement that a new, and, so far as the editor's notes are concerned, enlarged edition, is now offered to the profession. While making this transient mention of the valuable work before us, we avail ourselves of the opportunity to call attention to the remarkable man who was its author.

John William Smith appears to have been one of those prodigies in precocity, memory, and profound and various learning, that are sometimes, though rarely, presented to our view. This work was compiled by him and given to the profession in England at the early age of twenty-five. Mr. Smith was also the author of several other legal works, the most celebrated of which is Smith's Leading Cases. He died about ten years ago, at the early age of thirty-seven, a victim to consumption brought on, or at least accelerated, by too intense application. He had lived to acquire very large and valuable practice, and had his life been spared, would probably have attained the highest honors of the bar and the bench. A memoir of him to which we are indebted for the materials of this brief notice, may be found in Blackwood's Magazine for February, 1847.

Foster's (N. H.) Reports: Vol. V. We have already published one case of much interest from this volume, *Woodman* v. *Hubbard*, p. 67, in which the Superior Court of New Hampshire, not without strong reasons in favor of their decision, have decided adversely to the Supreme Court of Massachusetts in *Gregg* v. *Wyman*, 4 Cush. 312. We have also given our readers some selections from the marginal notes of the volume.

We regret very much that New Hampshire is to lose the services of so valuable a judge as Mr. Chief Justice Gilchrist. His appointment to the Court of Claims, however, is a judicious one, and is creditable to the administration. And we believe the State is not without resources to sustain her judicial reputation.

The Naturalization Laws of the United States: also, a Synopsis of the Alien Laws of all the States, together with the forms for Naturalization, Important Decisions, General Remarks on the subject, Historical, Past and Present, &c. &c. By a Member of the Bar. To which is added the Constitution of the United States. Rochester, N. Y.: D. M. Dewey. 1855.

We are not aware of any collection of these laws of recent date, and should think this compilation might be useful. Public attention is now drawn to the subject by late political movements, and those who are interested to know what those laws are, which a large portion of our fellow citizens seem to think too lax, will find this compilation a convenient book of reference.

Obituary Notice.

Died at Hartford, Connecticut, on the 1st of March last, the Hon. Thomas Day. The death of this gentleman, so long and so honorably associated with the profession of the law, deserves something more than a passing notice in the necrology of the bar. As a judge, a reporter, and an editor of law books, he has long been well known and respected. We are glad to preserve the following sketch of his life, and of some of the many offices of honor and trust whose duties he discharged.

"Thomas Day, the third son of Rev. Jeremiah Day, was born in New Preston Society, town of Washington, Conn., July 6th, 1777. He was a descendant, in the sixth generation, from Robert Day, who came to America among the first settlers in Massachusetts, and joined the company of one hundred persons, who, in 1638, under the lead of Rev. Thomas Hooker, first settled the town of Hartford, Conn. He graduated at Yale College, in 1797, read law with Judge Reeve, at Litchfield, and afterwards with Judge Dewey,* of the Supreme Court of Massachusetts, at Williamstown, where Mr. Day was a tutor in Williams College. In September, 1799, Mr. Day came to Hartford, read law with Theodore Dwight, Esq. was admitted to the bar in Dec. 1799, and immediately entered on the practice of law in Hartford, where he has ever since resided. In October, 1809, he was appointed assistant Secretary of State, (George Wyllys being the principal Secretary,) and in 1810 he was elected Secretary of State by the people, and so continued for twenty-five successive years, by annual re-election, until May, 1835.

In May 1815, he was appointed associate judge of the county court, for the county of Hartford, and annually afterwards, except one year, until May 1825, in which year he was made chief judge of that court, and was continued in that office by successive annual appointments, until June, 1833.

In 1818, as one of the senior aldermen of the city of Hartford, he became one of the judges of the city court, and continued such by successive annual elections, until March 1831.

He was one of the committee who prepared the statutes of 1808, [Conn.] and by him the notes were compiled, the index made, and the introduction written. He was also one of the committee who prepared the Statutes of 1821 and 1824.

In 1805, he commenced regularly reporting the decisions of the Supreme Court of Errors [of the State of Conn.]; but he took notes of cases in the latter half of the 18th century, and his reports cover a period ranging through more than fifty years. At the June term, 1853, he declined a re-appointment, and the Supreme Court of Errors were pleased to express their high respect for his eminent services and exalted character, and to thank him for his advancement of judicial science through his numerous reports, and other legal productions, and for his uniform kindness and courtesy in all his intercourse with the bench and the bar. He edited several English law works, in all about forty volumes, in which he introduced notices of American decisions, and made other improvements. . . . .

The Corporation of Yale College, in 1847, conferred on Judge Day the honorary degree of LL. D.

It is not known that he ever made or left an enemy."

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* Father of the present Judge Dewey.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, Isaac [1]	Boston,	March 21, 1855.	Charles Demond.
Adams, John	Worcester,	" 14,	Alexander H. Bullock.
Baldwin, Henry W.	Shrewsbury,	" 12,	Alexander H. Bullock
Bates, Cyrus	Abington,	" 21,	Welcome Young.
Beebe, Abner L	Ware,	" 27,	H. H Chilson.
Bell, James B.[1]	Boston,	" 21,	Charles Demond.
Bickford, Jesse	Boston,	" 27,	Isaac Ames.
Billings, George	Newton,	" 7,	Jno. W. Bacon
Bisbee, Jared	Plainfield,	" 30,	H. H. Chilson.
Brickett, Nathan A.	Roxbury,	" 19,	Francis Hilliard.
Clark, Edward	Easthampson,	" 12,	H H. Chilson.
Cleaveland, Charles M.	Leominster,	" 28,	C. H. B. Snow.
Cooke, Aldrich S.	Milford,	" 1,	T. G. Kent.
Crawford, Ethan A.	Woburn,	" 21,	John W. Bacon.
Cusick, George [2]	Salem,	" 27,	John G. King.
Denton, Wm. P.	Boston,	" 15,	Charles Demond.
Douglass, Thomas	Sheffield,	" 10,	Charles N. Emerson.
Dunbar, Henry M.	Florida,	" 23,	Shepherd Thayer.
Dunbar, Ruel	West Bridgewater,	" 5,	Welcome Young
Durgin, John M.	Wilmington,	" 27,	Isaac S. Morse.
Fay, Henry C	Southboro',	" 2,	Alexander H. Bullock
Fay, William C.	Boston,	" 1,	Charles Demond.
Fernald, William F.[3]	Newburyport,	" 12,	John G. King.
Fisher, John H.	Franklin,	" 15,	Francis Hilliard.
Flynn, Edward	Williamstown,	" 21,	Shepherd Thayer.
French, James M [4]	Braintree,	" 24,	Charles Endicott.
Gill, Henry	Worcester,	" 5,	Alexander H. Bullock.
Graves, Franklin W.	Lynn,	" 13,	John G. King.
Harwood, Dauphin	Hardwick,	" 2,	Charles Brimblecom.
Hewitt, Francis H.	Worcester,	" 28,	Alexander H. Bullock.
Howes, Isaiah	Needham,	" 9,	Francis Hilliard.
Johnson, Addison H.[5]	Sharon,	" 8,	Charles Endicott.
Knapp, Orris	Winchendon,	" 5,	C. H. B. Snow.
Learned, Paschal P.[6]	Worcester,	" 13,	Alexander H. Bullock.
Lincoln, Henry [7]	Boston,	" 31,	Charles Demond.
Lincoln, William [7]	Boston,	" 31,	Charles Demond.
Lunt, William H.	Tewksbury,	" 17,	Asa F. Lawrence.
Mann, Daniel F.	Dover,	" 21,	Francis Hilliard.
Manson, Eben [3]	Newburyport,	" 12,	John G. King.
Marshall, Zachariah	Groton,	" 8,	Isaac S. Morse.
Moorehouse, Roswell W.	Deerfield,	" 31,	David Aiken.
Morse, George H.[8]	Charlestown,	" 27,	Isaac Ames.
Morse, James C.[6]	Worcester,	" 13,	Alexander H. Bullock.
Morse, Samuel F.[8]	Boston,	" 27,	Isaac Ames.
Morse, Sam'l F. (individu'y),	Boston,	" 27,	Isaac Ames.
Monroe, James M.	Roxbury,	" 21,	Francis Hilliard.
Norcross, Warren F.	West Roxbury,	" 2,	Isaac Ames.
O'Connell, John	Salem,	" 1,	John G. King.
Peasley, Harrison	Dorchester,	" 9,	Francis Hilliard.
Penniman, Gardener S.[4]	Braintree,	" 24,	Charles Endicott.
Pitkin, Joseph C.	Lynn,	" 27,	John G. King.
Prichard, Abraham P.	Charlestown,	" 16,	John W. Bacon.
Proctor, John S.	Lowell,	" 9,	Isaac S. Morse.
Prouty, Homer R.[9]	North Brookfield,	" 12,	Alexander H. Bullock.
Rice, Selden	Worcester,	" 28,	Alexander H. Bullock.
Richardson, Osborn	Stoneham,	" 17,	Asa F. Lawrence.
Roberts, Joseph D.	Boston,	" 31,	Charles Demond.
Roundy, Thomas	Salem,	" 22,	John G. King.
Rowe, Austin F.	Sunderland,	" 19,	David Aiken.
Shephard, Allen	Somerville,	" 13,	Isaac S. Morse.
Stanley, Franklin L.	Danvers,	" 27,	John G. King.
Story, John 2d	Lynn,	" 15,	John G. King.
Waite, Daniel [9]	North Brookfield,	" 12,	Alexander H. Bullock.
Waite, Jonathan [9]			
Wesson, Leonard	Boston,	" 31,	Isaac Ames.
Whearty, Peter [2]	Salem,	" 27,	John G. King.
Wheeler, David B.	Lancaster,	" 31,	C. H. B. Snow.
Wheeler, Lorenzo D.	Fitchburg,	" 26,	C. H. B. Snow.
Whitcher, Lorenzo	Lowell,	" 10,	Isaac S. Morse.
Wing, Abraham R.[7]	Boston,	" 31,	Charles Demond.
Winship, Charles	Sharon,	" 8,	Charles Endicott.
Wood, Timothy B.	Boston,	" 6,	John M. Williams.
Woodard, Jonas	Hopkinton,	" 8,	Asa F. Lawrence.

[1] Adams & Bell.
[2] Partners.
[3] Partners.
[4] Co-partners.
[5] Co-partners.
[6] Learned & Co.
[7] Lincoln, Wing & Co.
[8] Sam'l F. Morse & Co.
[9] Waite & Prouty.